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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 145.

THE ATLANTIC AND PACIFIC RAILROAD COMPANY AND THE PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

VS.

H. S. HOPKINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

a

FILED OCTOBER 14, 1874.

13 & 14th Kansas Reports

Dec 23 1876

Reversed

Emery Esq

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1 Pleas before the honorable John F. Dillon, judge of the circuit court of the United States of America in and for the district of Kansas, at a term of said court begun and held at the city of Topeka, in said district, on Monday, the 24th day of November, A. D. 1873.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD Company, defendant.

Be it remembered that heretofore, to wit, on the 25th day of April, 1872, the said plaintiff, H. S. Hopkins, by Clough & Wheat, his attorneys, filed in the clerk's office of said court his petition, copy, precipe, and security for costs in the above-entitled case; which said petition, copy, precipe, and security for costs, and endorsements thereon, are in words and figures following, to wit:

Petition.

UNITED STATES OF AMERICA,
District of Kansas, ss:

In the circuit court of the United States for the district of Kansas.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD Company, defendant. } Petition.

2 The said H. S. Hopkins, the plaintiff in this action, who is a citizen of the State of Missouri, complains of the St. Louis, Lawrence and Denver Railroad Company, the defendant herein, which is a citizen of the State of Kansas and a corporation organized and existing in, under, and by virtue of the laws of the State of Kansas, for that one M. S. Hall heretofore, to wit, on the ninth day of August, A. D. 1871, at St. Louis, made and executed his certain written instrument of that date in the words and figures following, to wit:

ST. LOUIS, *Aug. 9th*, 1871.

Geo. W. Dietzler, Prest. St. Louis, Lawrence and Denver R. R. Co.:

Please pay to the order of H. S. Hopkins 31 bonds of ($1,000.00) one thousand dollars each of the city of Lawrence, Kansas, on account of bridges for said railroad, as per contract for same bet. M. S. Hall and H. S. Hopkins, and this shall be a receipt for the same.

M. S. HALL.

And said M. S. Hall then and there delivered the same to said plaintiff; and afterwards, to wit, on the day and year last aforesaid, the same said written instrument was duly presented and shown for acceptance thereof to the said defendant, the St. Louis, Lawrence and Denver Railroad Company aforesaid, and to George W. Dietzler, its agent in that behalf by it thereunto duly appointed and authorized, and who
3 then was, ever since has been, and still is the president of said defendant and of its board of directors. And said defendant, by its said president, the said George W. Dietzler, its agent in that behalf by it thereunto duly appointed and authorized, then and there, in writ-

ing, accepted the written instrument first-above mentioned, and wrote made, and executed thereon, on the face thereof, its certain other written instrument, its written accceptance thereof, in the words and figures following, to wit:

Accepted.

GEO. W. DIETZLER,
Prest. St. L., L. and D. R. R. Co.

And then delivered the same to said plaintiff, and thereby, for value received, and for divers good and valuable considerations, undertook and promised said plaintiff that it, the said defendant, would within a reasonable time thereafter, to wit, immediately thereafter, pay and deliver to the order of said plaintiff thirty-one bonds of the city of Lawrence, in the State of Kansas, of and for one thousand dollars each.

And said plaintiff further avers that afterwards, to wit, on the day and year aforesaid, and at divers other times since then, and again on the 23rd day of April, A. D. 1872, the written instruments aforesaid were presented and duly shown for payment thereof to said defendant and to its officers and agents in that behalf, including the said Dietzler as such president and one Charles Willemsen its treasurer, each of
4 whom is and then was an agent of said defendant in that behalf,
by it thereunto duly appointed and authorized, and payment thereof and of the bonds aforesaid was at the several times aforesaid duly demanded and required of and from said defendant and also from its several officers and agents aforesaid, which was then and there refused by said defendant, and also by its officers and agents aforesaid, except that twenty-one of the bonds aforesaid have been paid, and said defendant did not, nor did any person or persons at any of the times aforesaid, or at any other time, make any payment or deliver any bond or bonds to said plaintiff, but, on the contrary, wholly neglected and refused so to do, except that the aforesaid twenty-one bonds have been paid as aforesaid.

And said plaintiff further avers that the several bonds aforesaid, and such bonds as those above mentioned, are severally and each of them are and were at the several times aforesaid of great value, to wit, of the value of one thousand dollars each.

Whereby, and because of the matters aforesaid, said plaintiff has been and is damaged in a large sum, to wit, in the sum of ten thousand dollars.

Yet said defendant, though often requested, hath not as yet ever paid or delivered to said plaintiff the several sums of money above
5 mentioned, nor any nor either of them, nor any part thereof, nor
the several bonds above mentioned, nor any bond or bonds, but, on the contrary, has hitherto and still does wholly neglect and refuse to pay or deliver to said plaintiff the several bonds above mentioned, or any or either of them, or any bond or bonds or any money, except that the aforesaid twenty-one bonds have been paid as aforesaid and no more.

Wherefore said plaintiff prays and demands judgment against said defendant for the sum of ten thousand dollars, with interest thereon at the rate of seven per cent. per annum from the ninth day of August, A. D. 1871, and for costs of suit, &c.

CLOUGH & WHEAT,
Attorneys for Plaintiff.

Hereto annexed is a copy of each of the written instruments mentioned in the above petition and on which the above action is founded.

CLOUGH & WHEAT,
Attorneys for Plaintiff.

(Copy.)

St. Louis, *Aug. 9th*, 1871.

Geo. W. Deitzler,
Prest. St. Louis, Lawrence and Denver R. R. Co.:

Please pay to the order of H. S. Hopkins 31 bonds of ($1,000.00) one thousand dollars each of the city of Lawrence, Kansas, on account of bridges for said railroad, as per contract for same bet. M. S. Hall and H. S. Hopkins, and this shall be a receipt for the same.

6 M. S. HALL.

Accepted.

GEO. W. DEITZLER,
Prest. St. L., L. and D. R. R. Co.

Precipe.

The clerk of the above named court will please issue a summons to the defendant in the above-entitled suit and direct the same to the marshal of the United States for the district of Kansas, and make the same returnable in five days from the date thereof. The plaintiff claims judgment for ten thousand dollars, with interest thereon at the rate of seven per cent. per annum from the 9th day of August, 1871, & for costs of suit, &c., &c.

CLOUGH & WHEAT,
Attorneys for Plaintiff.

Security for costs.

In the circuit court of the United States for the district of Kansas.

H. S. Hopkins, plaintiff,
vs.
St. Louis, Lawrence and Denver Railroad Company, defendant.

I enter myself security for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 25th day of April, 1872.

7 WILLIAM McNEILL CLOUGH.
L. B. WHEAT.

(Endorsed:) No. 511. H. S. Hopkins against St. Louis, Lawrence and Denver Railroad Co. Petition, copy, precipe, and security for costs. Filed April 25, 1872. A. S. Thomas, clerk. Clough & Wheat, attorneys for plaintiff.

And on this day, to wit, the 25th day of April, A. D. 1872, a writ of summons issued out of the said clerk's office against the said defendant in the said entitled cause; which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
District of Kansas, ss:

The United States of America to the marshal of the District of Kansas, greeting:

You are hereby commanded to notify the St. Louis, Lawrence and Denver Railroad Company that it has been sued by H. S. Hopkins, in the circuit court of the United States for the district of Kansas, and that unless it answers by the 20th day of May, A. D. 1872, the petition of the said H. S. Hopkins against it filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 30th day of April, A. D. 1872.

8 Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at Topeka, in said district, this 25th day of April, A. D. 1872.

[SEAL.] A. S. THOMAS, *Clerk.*

Suit brought for the recovery of money, amount claimed $10,000, with interest from the 9th day of August, A. D. 1871, at the rate of seven per cent. per annum, and for costs of suit, &c.

CLOUGH & WHEAT,
Attys. for Plaintiff.

(Endorsed:) No. 511. Circuit court of the United States, district of Kansas. H. S. Hopkins vs. St. Louis, Lawrence and Denver Railroad Company. Summons; issued April 25th, 1872; returnable April 30th, 1872.

U. S. marshal's return.

Marshal's return.

DISTRICT OF KANSAS, *ss:*

I received this summons on the 25th day of April, A. D. 1872, at nine o'clock a. m., of that day, and I served the same in the city of Lawrence, in the district and State of Kansas, on the within-named defendant, on that same day, by delivering a copy thereof, with all the endorsements thereon, to Solon O. Thacher, the vice-president of said defendant and its chief officer, on whom I then served said summons by delivering to him personally as such vice-president a copy of said summons, said Thacher being then the chief officer of said defendant next to its 9 absent president; and I then further, on said day, in said city of Lawrence, served said summons on said defendant, by delivering another copy thereof, with all the endorsements thereon, to H. M. Simpson, the secretary of said defendant, on whom I then served said summons by delivering to him personally, as such secretary, a copy of said summons, with all the endorsements thereon, in said State and district. I have been unable to find the president, chairman of the board of directors, or trustees, or other chief officer of said defendant in said district and State.

D. W. HOUSTON,
U. S. Marshal for the District of Kansas,
By ANDREW CARNES, *Deputy.*

Marshal's fees: For service, 4.00; mileage, 1.80; $5.80.
Filed April 29, A. D. 1872.

A. S. THOMAS, *Clerk.*

CLOUGH & WHEAT,
Attorneys for Plaintiff.

And on this day, to wit, the 20th day of May, 1872, came the defendant, by Thacher & Banks, its attorneys, and filed in the said clerk's office its answer in the said entitled cause; which said answer is in the words and figures following, to wit:

Answer.

In U. S. circuit court, district of Kansas.

H. S. HOPKINS
vs.
10 THE ST. LOUIS, LAWRENCE AND DENVER Railroad Co.

The defendant in this action, answering the petition of the plaintiff herein, denies that George W. Dietzler, mentioned in the plaintiff's petition in this action, had any power or authority from this defendant to accept the said written instrument in said petition mentioned and set forth.

And it further denies that it ever authorized said Dietzler to accept or in any manner agree to pay or deliver the bonds in said petition mentioned & set forth to the said H. S. Hopkins, or to any one in his behalf. And this defendant, further answering, denies that it ever accepted the said instrument in writing, or agreed to pay the same, or deliver the bonds therein mentioned, or any part thereof.

And this defendant, further answering the said petition, denies that said bonds were of the value of one thousand dollars each, and it also denies that said George W. Dietzler was the agent of this defendant for delivery of the bonds mentioned in said plaintiff's petition, or any part thereof.

2nd. And these defendants further show that on the 9th day of August, 1871, they were building the road-bed and bridges of their railroad from Pleasant Hill, in the State of Missouri, to Lawrence, in the State of Kansas. That by contract with the Missouri Pacific Railroad Company this defendant was under obligation to complete their said road-bed & bridge work from said Pleasant Hill to Lawrence aforesaid as soon as the first day of November, 1871, or, in default thereof, suffer
11 large losses. That said M. S. Hall, in said plaintiff's petition mentioned, had contracted with this defendand to do the bridge-work upon the said road, and, in order to fulfil his said contract, had purchased materials and bridges of said plaintiff, which said plaintiff agreed to furnish & deliver to said Hall to place upon said road as fast as required therefor, & in payment therefor gave to said plaintiff the instrument in writing mentioned and set forth in said plaintiff's petition. That said plaintiff, after receiving said instrument in writing, and well knowing the obligation of the defendant to so build said road-bed & bridges & well knowing the pecuniary losses to which defendant would be liable in case of a failure so to complete the same, and well knowing said M. S. Hall to be insolvent and irresponsible, and contriving and fraudulently intending to oppress this defendant and exact large sums of money from defendant by reason of the premises, refused to fulfil & perform the said contract with him, the said M. S. Hall, for furnishing the bridges aforesaid, and in payment whereof said instrument in writing was executed & delivered, and forced and compelled this defendant to pay to him, the said plaintiff, as a condition of his fulfilling his said contract, the sum of three thousand dollars in money, which payment they were compelled

to & did make to the said plaintiff without consideration, & 12 only as an inducement to him to perform his contract with said Hall, and to save themselves from losses aforesaid. That said bonds were not then worth to exceed the sum of forty-five cents on the dollar, and that said plaintiffs were forced to and did sell over six thousand dollars in nominal *order* of said bonds in order to procure the said sum of three thousand dollars so exacted of and paid to said plaintiff as aforesaid, whereby a cause of action accrued in favor of the defendant against said plaintiff for said sum of three thousand dollars, with interest thereon since the payment thereof as aforesaid.

3rd. And defendant, further answering, shows that the said paper writing mentioned and set forth in said plaintiff's petition was given by said M. S. Hall in fulfilment of a contract, and as a part thereof, made between said plaintiff and said M. S. Hall, whereby said plaintiff agreed to furnish & deliver to said M. S. Hall a certain quantity of bridge-work & material, in consideration whereof said Hall delivered to said plaintiff the said instrument in writing. That afterwards, and on or about the first day of September, 1871, said M. S. Hall and the said plaintiff mutually agreed to and did abandon the said contract & cancelled the same, and entered into another & distinct contract and agreement, whereby, in consideration that said plaintiff would un- 13 dertake to complete on his part the performance of the prior contract for furnishing bridges and bridge-work, he, the said M. S. Hall, undertook individually to deliver to said plaintiff thirty-one bonds of the city of Lawrence, of the nominal value of one thousand dollars each, & also paid to said plaintiff the further sum of three thousand dollars in cash. That by reason of the premises, the supposed acceptance of said instrument in writing became void and of no effect, & the consideration of the same wholly failed.

And the defendant denies each & every allegation of said petition not hereinbefore specifically admitted or denied.

THACHER & BANKS,
Deft's Attys.

STATE OF KANSAS, *Douglas County, ss:*

Nelson T. Stephens, being duly sworn, deposes and says, that he is one of the attorneys for the defendant in this action and that he believes the allegation in the foregoing answer to be true; that the defendant denies that George W. Dietzler, mentioned in the plaintiff's petition in this action, had any power or authority from this defendant to accept the said written instrument in said petition mentioned and set forth, and it further denies that it ever authorized said Dietzler to accept or in any manner agree to pay or deliver the bonds in said petition 14 mentioned & set forth to the said H. S. Hopkins, or to any one in his behalf.

N. T. STEPHENS.

Subscribed and sworn to before me this 20th day of May, 1872.
[SEAL.] DAVID C. BEACH,
Notary Public.

(Endorsed:) No. 511. H. S. Hopkins vs. St. Louis, Lawrence & Denver Railroad Company. Answer of deft.
Filed May 20, 1872. A. S. Thomas, clerk. Thacher & Banks.

15 And on this day, to wit, May 28th, A. D. 1872, came the said plaintiff, by Clough & Wheat, his attorneys, and filed in the said

clerk's office his reply in the said entitled cause; which reply is in the words and figures following, to wit:

Reply.

UNITED STATES OF AMERICA,
District of Kansas, ss:

In the circuit court of the United States for the district of Kansas.

H. S. HOPKINS, PLAINTIFF,
vs.
THE ST. LOUIS, LAWRENCE AND DENVER Railroad Company, defendant. } Reply.

1st. And now comes H. S. Hopkins, the above-named plaintiff, and for his reply to the answer of the above-named defendant, denies all, each, and every allegation and averment therein contained.

2d. And for a second and further cause of reply in this behalf to the second subdivision of said answer as therein numbered, said plaintiff avers that the George W. Dietzler in said answer mentioned was president of said defendant at the several times referred to in the petition in this action, with power to act as such.

3d. And for a third and further cause of reply in this behalf to said second subdivision of said answer, said plaintiff avers that said
16 defendant is and was at the several times in the aforesaid petition mentioned a corporation with power to contract.

4th. And for a second and further cause of reply in this behalf to the third subdivision of said answer as therein numbered, said plaintiff avers that the said defendant is and was at the several times mentioned in the petition aforesaid a corporation with power to contract.

CLOUGH & WHEAT,
Attorneys for Plaintiff.

(Endorsed:) No. 511. H. S. Hopkins vs. The St. Louis, Lawrence & Denver R. R. Co. Reply.

Filed May 28, 1872. A. S. Thomas, clerk. Clough & Wheat.

And on this day, to wit, the 1st day of June, A. D. 1872, came the said plaintiff, by Clough & Wheat, his attorneys, and filed in the said clerk's office his notice & motion to produce, &c., in the said entitled cause; which said notice & motion to produce, &c., is in the words and figures following, to wit:

Notice, motion, &c.

UNITED STATES OF AMERICA,
District of Kansas, ss:

In the circuit court of the United States for the district of Kansas.

H. S. HOPKINS, PLAINTIFF,
vs.
THE ST. LOUIS, LAWRENCE AND DENVER Railroad Company, defendant. 17

The above-named defendant, and its attorneys in this the above entitled action, are hereby notified and required to have and produce in the above-named court, in said action, on the trial thereof, all the records and entries of proceedings of the board of directors of said defendant, and all reports to said board of directors ever made by any officer thereof, of or concerning any transactions for or on behalf of said defendant, and all books and writings which show or contain a statement, minute, or record of any of said proceedings, or of any such report, and all letters ever written or sent by the above-named plaintiff to said defendant, or to any officer or agent thereof, and particularly the following letters, namely: The letter dated of the 19th day of September, 1871, written by said plaintiff to George W. Dietzler, the president of said defendant, and mentioned in the letter dated of the 20th day of September, 1871, which said Dietzler wrote to said plaintiff, and the letter dated of the 23d day of December, 1871, written by said plaintiff to said Dietzler, president as aforesaid, and mentioned in the letter of said Dietzler to said plaintiff, dated of the 26th day of December, 1871, and the letter dated of the 20th day of January, 1872, written by said plaintiff to said Dietzler, president as aforesaid, so that the 18 same can be read and used in evidence on said trial, and on each trial of said action,

And you and every of you, the defendant and its attorneys aforesaid, are further hereby notified that said plaintiff will, on this first day of June, 1872, or so soon as he can be heard, move said court to order and require said defendant and its attorneys, officers, and agents, to produce the letters, statements, minutes, records, entries, books, reports, and writings aforesaid in said court and action, at the trial thereof, and at each trial thereof, so that the same can be read and used in evidence on the trial of said action.

And the said defendant and its attorneys are further hereby notified that said plaintiff will move said court to give him judgment in said action by default, if said defendant or its attorneys shall fail to comply with such order or requirement.

June 1st, 1872. CLOUGH & WHEAT,
Attorneys for Plaintiff.

The above notice was served on us at Topeka, by delivery of a duplicate of the same to us, this 1st day of June, 1872.

THACHER & BANKS,
Deft's Attys.

(Endorsed:) 511. H. S. Hopkins vs. The St. Louis, L. & D. R. R. Co. Notice and motion to produce, &c. Filed June 1, 1872. A. S. Thomas, clerk.

19, 20 And at a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and seventy-two—present, honorable John F. Dillon, judge—the following proceedings, among others, were had and appear of record in the words and figures following, to wit:

Journal entry.

THURSDAY, *June 6th*, 1872.

H. S. HOPKINS, PLAINTIFF,
vs.
SAINT LOUIS, LAWRENCE AND DENVER Railroad Company, defendant.
} 511.

And now comes the plaintiff, by Clough & Wheat, his attorneys, and also comes the defendant herein, by Thacher & Banks, its attorneys, and thereupon the motion of said plaintiff filed herein on the *the* first day of this present month came on for further hearing, (the same having been partially heard on said first day of June, 1872,) and the
21 court having heard the evidence and arguments of counsel, and
being well advised in the premises, doth now order that the defendant herein, its officers and agents in this action, have and produce in this court on the trial of this action all books and writing of said defendant which contain any record or entry of any proceeding of the board of directors of said defendant, and also all reports in writing to said board of directors ever made by any officer thereof, of or concerning any transactions for or on behalf of said defendant during the years 1870 and 1871, and in default thereof that an attachment issue against the defendant and its officers.

And it is further ordered that said defendant produce in this court on the trial of this action the following letters, alleged to be in the possession of the defendant and its officers, namely: The letter dated of the 19th day of September, 1871, written by said plaintiff to George W. Dietzler, the president of said defendant, and mentioned in the letter dated of the 20th day of September, 1871, which said Dietzler wrote to said plaintiff; and the letter dated of the 23d day of December, 1871, written by said plaintiff to said Dietzler, president as aforesaid, and mentioned in the letter of said Dietzler to said plaintiff, dated of the 26th day of December, 1871, and the letter dated of the 20th day of
22 January, 1872, written by said plaintiff to said Dietzler, president
as aforesaid, so that the same can be read and used in evidence on said trial and on each trial of this action, or show cause why the same cannot be so produced at the next term of this court to which this cause is continued, at the costs of the defendant for the term.

And on this day, to wit, the 29th day of November, 1872, a stipulation waiving jury trial was filed in the said clerk's office in the said entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA,
District of Kansas, ss:

In the circuit court of the United States for the district of Kansas.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER Railroad Company, defendant.

The above-named plaintiff and defendant hereby waive a jury in this the above-entitled action, and stipulate that the same may be tried by the court without a jury.

Nov. 29th, 1872.

CLOUGH & WHEAT,
23 *Attorneys for Plaintiff.*
N. T. STEPHENS,
Deft's Attorney.

(Endorsed:) No. 511. H. S. Hopkins vs. St. Louis, &c., R. R. Co. Waiver of jury. Filed Nov. 29, 1872. A. S. Thomas, clerk.

And at a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at Topeka, in said district, on Monday, the twenty-fifth day of November, A. D. 1872—present, honorable John F. Dillon and honorable Mark W. Delahay, judges—the following proceedings, among others, were had, and appear of record in the words and figures following, to wit:

Journal entry.

SATURDAY, *November* 30, 1872.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD Company, defendant. } 511.

And now on this day comes the plaintiff herein, by Clough & Wheat, his attorneys, and also comes the defendant herein, by Messrs. Thacher & Banks, N. T. Stephens, and W. W. Nevison, its attorneys, and this action coming on in its order for trial, the parties, plaintiff and defendant, waive a jury, and submit this action to the court for trial;
24 and the court having heard the evidence and arguments of counsel, and being well advised in the premises, finds for the said plaintiff, and assesses his damages at the sum of six thousand three hundred and eighty-five dollars against said defendant.

It is therefore now by the court here considered, ordered, and adjudged, that said plaintiff, H. S. Hopkins, have and recover of and from the St. Louis, Lawrence and Denver Railroad Company, the defendant herein, the sum of six thousand three hundred and eighty-five dollars, ($6,385,) with interest thereon at the rate of seven per cent. per annum from this time until paid, and also for his costs in this action expended, taxed at $, and that execution issue therefor.

Order.—Receipt of M. S. Hall for bonds.

And on this day, to wit, the 2nd day of December, A. D. 1872, was filed in the clerk's office of said court an order from M. S. Hall on Geo. W. Dietzler, prest. St. L., L. & D. R. R. Co.; which said order is in the words and figures following, to wit:

ST. LOUIS, *Aug. 9th*, 1872.

GEO. W. DIETZLER,
Prest. St. Louis, Lawrence and Denver R. R. Co.:

Please pay to the order of H. S. Hopkins 31 bonds of ($1,000.00) one thousand dollars each, of the city of Lawrence, Kansas, on account of bridges for said railroad, as per contract for same bet. M. S. Hall and H. S. Hopkins, and this shall be a receipt for the same.

M. S. HALL.

Accepted.
25 GEO. W. DIETZLER,
Prest. St. L., L. and D. R. R. Co.

(Endorsed:) Aug. 17th, 1871, recd. of Col. G. W. Dietzler 15 bonds of $1,000.00 each. Oct. 3d, 1871, recd. of Col. G. W. Dietzler 3 bonds of $1,000 each. Oct. 30th, 1871, recd. of Col. G. W. Dietzler, by the hands A. D. Searl, 3 bonds of $1,000 each. Filed Dec. 2, 1872. A. S. Thomas, clerk. No. 511.

26, 27 UNITED STATES OF AMERICA,
District of Kansas ss:

The United States of America to the marshal of the United States of America for the said district of Kansas, greeting:

Whereas H. S. Hopkins, on the 30th day of November, A. D. 1872, obtained judgment before the circuit court of the United States of America for the said district of Kansas, sitting in Topeka, within and for the district of Kansas, against the St. Louis, Lawrence and Denver Railroad Company for the sum of sixty-three hundred & eighty-five $\frac{00}{100}$ dollars debt, and interest from the date of said judgment, at seven per cent. per annum; and also for the sum of two hundred & eighty-four $\frac{85}{100}$ dollars, as costs in this behalf expended, with two $\frac{45}{100}$ dollars costs on this and previous executions.

These are therefore to command you, that of the goods, chattels, lands, tenements, and chattels real of the said St. Louis, Lawrence and Denver Railroad Company you cause to be made the debt, interest, damages, and costs aforesaid; and that you have the same before the court aforesaid in sixty days from this date, in the city of Topeka, and that you then and there certify how you have executed this writ.

Witness Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, with the seal of said circuit court affixed, at Topeka, in said district, this the 10th day of Decr., A. D. 1872.

[SEAL.]

A. S. THOMAS, *Clerk.*

28 *U. S. marshal's return.*

DIST. OF KANSAS, *ss:*

Received the within writ of execution Dec. 10th, 1872, and for return of the same, I certify that after diligent search I have been unable to find any property belonging to the within-named defendant, the St. Louis, Lawrence and Denver Railroad Company by which I could make the within amount, or any part thereof.

D. W. HOUSTON,
U. S. Marshal for said Dist.,
By CHAS. H. MILLER,
Deputy.

(Indorsed:) No. 511. U. S. C. C. H. S. Hopkins vs. St. Louis, Lawrence and Denver Railroad Company. Execution No. ; issued Dec. 10th, 1872; debt, $6,385.10; int. $, from Nov. 30, 1872; cost, $287.30; R. & F. 25. Filed Feb'y 8, 1873. A. S. Thomas, clerk. Clough & Wheat, attorney.

29 UNITED STATES OF AMERICA,
District of Kansas, ss:

The United States of America to the marshal of the United States of America for the said district of Kansas, greeting:

Whereas H. S. Hopkins, on the 30th day of November, A. D. 1872, obtained judgment before the circuit court of the United States of

America for the said district of Kansas, sitting in Topeka, within and for the district of Kansas, against the St. Louis, Lawrence and Denver Railroad Company, for the sum of sixty-three hundred and eighty-five $\frac{00}{100}$ dollars, debt, and interest from the date of said judgment at seven per cent. per annum, and also for the sum of two hundred and eighty-four $\frac{85}{100}$ dollars, as costs in this behalf expended, with three $\frac{80}{100}$ dollars costs on this and previous executions.

These are, therefore, to command you, that of the goods, chattels, lands, tenements, and chattels real of the said St. Louis, Lawrence and Denver Railroad Company, you cause to be made the debt, interest, damages, and costs aforesaid; and that you have the same before the court aforesaid in sixty days from this date, in the city of Topeka, and that you then and there certify how you have executed this writ.

Witness Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, with the seal of said circuit court affixed, at Topeka, in said district, this the 22nd day of March, A. D. 1873.

[SEAL.] A. S. THOMAS, *Clerk.*

30 *U. S. marshal's return.*

DISTRICT OF KANSAS, *ss:*

Received the within writ of execution March 22nd, 1873, and for return of the same I certify that after diligent search I have been unable to find any property or effects in my district belonging to the within-named defendant by which I could make the within amount, or any part thereof.

W. S. TOUGH,
U. S. Marshal Dist. of Kans.,
By CHAS. H. MILLER, *Deputy.*

(Indorsed:) No. 511; U. S. C. C. H. S. Hopkins vs. St. Louis, Lawrence and Denver Railroad Company. Execution No. 242; issued March 22, 1873; debt, $6,385.10; int. $, from Nov. 30, 1872; cost, $288.65; R. & F., .25. Filed May 29, 1873. A. S. Thomas, clerk.
Clough & Wheat, attorney.

31 And on this day, to wit, the 19th day of June, A. D. 1873, came Lysander B. Wheat, one of the attorneys for the plaintiff, and filed in the said clerk's office his affidavit in the said entitled cause; which said affidavit is in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas.

Affidavit L. B. Wheat.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD Company, defendant.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, the undersigned, Lysander B. Wheat, being first duly sworn, do on oath depose and say, that I am one of the attorneys in this the above entitled action of and for H. S. Hopkins, the plaintiff in said action.

And affiant further on oath deposes and says, that he has good reasons to and does believe that the Pacific Railroad is indebted to the St. Louis, Lawrence and Denver Railroad Company, the defendant in said action.

And affiant further on oath deposes and says, that two executions have been issued on the judgment rendered in said action. And that each of said executions have been returned unsatisfied. Affiant further deposes and says that the Pacific Railroad aforesaid is a corporation.

32 LYSANDER B. WHEAT.

Subscribed in my presence and sworn to before me, at my office, in the city of Leavenworth, Kansas, this 18th day of June, A. D. 1873.

Z. E. BRITTON,
Commissioner of the Circuit Court of the United States for the District of Kansas to take acknowledgement of bail and affidavits, &c.

(Endorsed:) No. 511. H. S. Hopkins vs. St. Louis, Lawrence and Denver Railroad Co. Affidavit. Filed June 19, 1873. A. S. Thomas, clerk.

And on this day, to wit, the 19th day of June, A. D. 1873, came L. B. Wheat, one of the attorneys for the plaintiff, and filed in the said clerk's office his affidavit in the said entitled cause; which said affidavit is in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas.

Affidavit L. B. Wheat.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD Company, defendant.

UNITED STATES OF AMERICA,
District of Kansas, ss;

I, the undersigned, Lysander B. Wheat, being first duly sworn, do on oath depose and say, that I am one of the attorneys in this the
33 above-entitled action of and for H. S. Hopkins, the plaintiff in said action. And affiant further on oath deposes and says, that he has good reason to and does believe that the Atlantic and Pacific Railroad Company is indebted to the St. Louis, Lawrence and Denver Railroad Company, the defendant in said action. And affiant further on oath deposes and says, that two executions have been issued on the judgment rendered in said action, and that each of said executions have been returned unsatisfied. Affiant further deposes and says, that the Atlantic and Pacific Railroad Company aforesaid is a corporation.

LYSANDER B. WHEAT.

Subscribed in my presence and sworn to before me, at my office, in the city of Leavenworth, Kansas, this 18th day of June, A. D. 1873.

Z. E. BRITTON,
Commissioner of the Circuit Court of the United States for the District of Kansas to take acknowledgement of bail and affidavits, &c.

America for the said district of Kansas, sitting in Topeka, within and for the district of Kansas, against the St. Louis, Lawrence and Denver Railroad Company, for the sum of sixty-three hundred and eighty-five $\frac{00}{100}$ dollars, debt, and interest from the date of said judgment at seven per cent. per annum, and also for the sum of two hundred and eighty-four $\frac{85}{100}$ dollars, as costs in this behalf expended, with three $\frac{80}{100}$ dollars costs on this and previous executions.

These are, therefore, to command you, that of the goods, chattels, lands, tenements, and chattels real of the said St. Louis, Lawrence and Denver Railroad Company, you cause to be made the debt, interest, damages, and costs aforesaid; and that you have the same before the court aforesaid in sixty days from this date, in the city of Topeka, and that you then and there certify how you have executed this writ.

Witness Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, with the seal of said circuit court affixed, at Topeka, in said district, this the 22nd day of March, A. D. 1873.

[SEAL.] A. S. THOMAS, *Clerk.*

30 *U. S. marshal's return.*

DISTRICT OF KANSAS, *ss:*

Received the within writ of execution March 22nd, 1873, and for return of the same I certify that after diligent search I have been unable to find any property or effects in my district belonging to the within-named defendant by which I could make the within amount, or any part thereof.

W. S. TOUGH,
U. S. Marshal Dist. of Kans.,
By CHAS. H. MILLER, *Deputy.*

(Indorsed:) No. 511; U. S. C. C. H. S. Hopkins vs. St. Louis, Lawrence and Denver Railroad Company. Execution No. 242; issued March 22, 1873; debt, $6,385.10; int. $, from Nov. 30, 1872; cost, $288.65; R. & F., .25. Filed May 29, 1873. A. S. Thomas, clerk. Clough & Wheat, attorney.

31 And on this day, to wit, the 19th day of June, A. D. 1873, came Lysander B. Wheat, one of the attorneys for the plaintiff, and filed in the said clerk's office his affidavit in the said entitled cause; which said affidavit is in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas.

Affidavit L. B. Wheat.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD Company, defendant.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, the undersigned, Lysander B. Wheat, being first duly sworn, do on oath depose and say, that I am one of the attorneys in this the above entitled action of and for H. S. Hopkins, the plaintiff in said action.

And affiant further on oath deposes and says, that he has good reasons to and does believe that the Pacific Railroad is indebted to the St. Louis, Lawrence and Denver Railroad Company, the defendant in said action.

And affiant further on oath deposes and says, that two executions have been issued on the judgment rendered in said action. And that each of said executions have been returned unsatisfied. Affiant further deposes and says that the Pacific Railroad aforesaid is a corporation.

32 LYSANDER B. WHEAT.

Subscribed in my presence and sworn to before me, at my office, in the city of Leavenworth, Kansas, this 18th day of June, A. D. 1873.

Z. E. BRITTON,
Commissioner of the Circuit Court of the United States for the District of Kansas to take acknowledgement of bail and affidavits, &c.

(Endorsed:) No. 511. H. S. Hopkins vs. St. Louis, Lawrence and Denver Railroad Co. Affidavit. Filed June 19, 1873. A. S. Thomas, clerk.

And on this day, to wit, the 19th day of June, A. D. 1873, came L. B. Wheat, one of the attorneys for the plaintiff, and filed in the said clerk's office his affidavit in the said entitled cause; which said affidavit is in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas.

Affidavit L. B. Wheat.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD
Company, defendant.

UNITED STATES OF AMERICA,
District of Kansas, ss;

I, the undersigned, Lysander B. Wheat, being first duly sworn, do on oath depose and say, that I am one of the attorneys in this the 33 above-entitled action of and for H. S. Hopkins, the plaintiff in said action. And affiant further on oath deposes and says, that he has good reason to and does believe that the Atlantic and Pacific Railroad Company is indebted to the St. Louis, Lawrence and Denver Railroad Company, the defendant in said action. And affiant further on oath deposes and says, that two executions have been issued on the judgment rendered in said action, and that each of said executions have been returned unsatisfied. Affiant further deposes and says, that the Atlantic and Pacific Railroad Company aforesaid is a corporation.

LYSANDER B. WHEAT.

Subscribed in my presence and sworn to before me, at my office, in the city of Leavenworth, Kansas, this 18th day of June, A. D. 1873.

Z. E. BRITTON,
Commissioner of the Circuit Court of the United States for the District of Kansas to take acknowledgement of bail and affidavits, &c.

(Endorsed:) No. 511. H. S. Hopkins vs. St. Louis, Lawrence and Denver Railroad Co. Affidavit. Filed 19th of June, 1873. A. S. Thomas, clerk.

34 And on this day, to wit, the 19th day of June, A. D. 1873, the clerk of said court issued orders to the Atlantic and Pacific Railroad Company and the Pacific Railroad Co. to answer certain interrogatories; which orders and interrogatories, with the endorsements thereon, are in the words and figures following, to wit:

35 *Order.*

H. S Hopkins, plaintiff,
vs.
St. Louis, Lawrence and Denver Railroad Company, defendant.

In the circuit of the United States for the district of Kansas.

And now H. S. Hopkins, the plaintiff in this the *the* above-entitled action, propounds the following inter'ogatories to the Atlantic and Pacific Railroad Company and to the officers and agents thereof:

Inter'ogatory first. What sum and sums of money has the Atlantic and Pacific Railroad Company aforesaid assumed to pay the St. Louis, Lawrence and Denver Railroad Company for or on behalf of the Pacific Railroad, and when and in what sums does the same come due? State all the facts in relation to such matters.

Interrogatory second. Did the Pacific Railroad and the Atlantic and Pacific Railroad Company and the South Pacific Railroad Company, in the year A. D. 1872, make and enter into a contract, dated of the 29th day of June, A. D. 1872, between themselves; and, if they did, what was and is said contract, so far as the same relates to or is of or concerning the St. Louis, Lawrence and Denver Railroad Company, or the payment of any sum or sums of money thereto or therefor, or the payment by the Atlantic and Pacific Railroad Company aforesaid for or on account or on behalf of the Pacific Railroad aforesaid to the St. 36 Louis, Lawrence and Denver Railroad Company aforesaid, and when are such payments required to be made, and when and in what sums? State fully and particularly all about such matters.

Interrogatory third. Did the Pacific Railroad aforesaid and the St. Louis, Lawrence and Denver Railroad Company aforesaid ever enter into any contract or contracts? If they did, state fully and particularly the date, time of execution, terms, tenor, and effect of each of them separately, each in its order as made; state fully and particularly what moneys and what sums of money the Pacific Railroad aforesaid is or has been by such contracts, respectively, or any of them, required to pay to the St. Louis, Lawrence and Denver Railroad Company aforesaid, and when the same have or will come due, and when each of such sums of money have or will come due, and on what terms, conditions, and contingencies any such sums of money have or will come due; and state whether the Atlantic and Pacific Railroad Company aforesaid has assumed to pay the same, or any thereof; and, if so, how and when. State all about such matters fully and particularly.

Interrogatory fourth. Is or was the Atlantic and Pacific Railroad Company indebted to *to* the St. Louis, Lawrence and Denver Railroad Company in any sum or sums of money whatever at the time

37 when these interrogatories were served on it, the Atlantic and Pacific Railroad Company aforesaid, or at any time since then or when the order for it to answer interrogatories in the above-entitled action was served on it, or at any time since then. State what payments, if any, the Atlantic and Pacific Railroad Company aforesaid has, or ought to have, since said order was served on it, made to the St. Louis, Lawrence and Denver Railroad Company aforesaid, and state when and on what terms, conditions, and contingencies any sum or sums of money has heretofore or will or may hereafter come due from either the Pacific Railroad aforesaid, or from the Atlantic and Pacific Railroad Company aforesaid, to the St. Louis, Lawrence and Denver Railroad Company aforesaid, and whether the Atlantic and Pacific Raidroad Company aforesaid has assumed or contracted to pay the same, and, if it has, when, how, and to whom, and on what terms, conditions, & contingencies, and whether the same is due, and, if not, when, and on what terms, conditions, and contingences will or may the same come due and from and to whom. State fully and particularly all about the matters aforesaid.

38 Interrogatory fifth. What sums of money have been due or owing from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company at any time since the order in the above-entitled action to the Pacific Railroad aforesaid was served on it? State fully and particularly all about such matters.

Interrogatory sixth. Has the Pacific Railroad promised or contracted to pay to the St. Louis, Lawrence and Denver Railroad Company any sum or sums of money, either for the use of any railroad or for any consideration, either absolutely or on any conditions or contingencies? State all about such matters, and when such sum and sums of money have or will come due, and state particularly all about each contract between the Pacific Railroad and the St. Louis, Lawrence and Denver Railroad Company, and the terms, tenor, and effect thereof.

Inter'ogatory seventh. State what sums of money have or will come due from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company, and when such of the same as is already due came due, and when and on what conditions and contingencies, if any, each of the other of such sums will come due.

Interrogatory eighth. What contracts have been made or entered into by or between the Pacific Railroad and the St. Louis, Law-
39 rence and Denver Railroad Company, either between themselves only or between them and some other person or persons, corporation or corporations, and what is the terms, tenor, and effect of each of such contracts, and when were the same respectively made, and what other person or persons, corporation or corporations, if any, are parties to such contracts, or any of them? State fully and particularly the terms, tenor, and effect of each of such contracts in all respects whatever, and state what sums of money have heretofore or will or may hereafter be or become due from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company on any such contract, and when the same did or will or may come due, respectively, and in what sums and on what terms, conditions, and contingencies, if any; state fully and particularly all about each and every of the matters above mentioned, and state the exact language of each of such contracts, and when and how the same were made, and whether the same is written or not, or partly written and partly printed, and annex a copy thereof to the answer to this interrogatory.

Interrogatory ninth. Has the Atlantic and Pacific Railroad Com-

(Endorsed:) No. 511. H. S. Hopkins vs. St. Louis, Lawrence and Denver Railroad Co. Affidavit. Filed 19th of June, 1873. A. S. Thomas, clerk.

34 And on this day, to wit, the 19th day of June, A. D. 1873, the clerk of said court issued orders to the Atlantic and Pacific Railroad Company and the Pacific Railroad Co. to answer certain interrogatories; which orders and interrogatories, with the endorsements thereon, are in the words and figures following, to wit:

35 *Order.*

H. S HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILroad Company, defendant.

In the circuit of the United States for the district of Kansas.

And now H. S. Hopkins, the plaintiff in this the *the* above-entitled action, propounds the following inter'ogatories to the Atlantic and Pacific Railroad Company and to the officers and agents thereof:

Inter'ogatory first. What sum and sums of money has the Atlantic and Pacific Railroad Company aforesaid assumed to pay the St. Louis, Lawrence and Denver Railroad Company for or on behalf of the Pacific Railroad, and when and in what sums does the same come due? State all the facts in relation to such matters.

Interrogatory second. Did the Pacific Railroad and the Atlantic and Pacific Railroad Company and the South Pacific Railroad Company, in the year A. D. 1872, make and enter into a contract, dated of the 29th day of June, A. D. 1872, between themselves; and, if they did, what was and is said contract, so far as the same relates to or is of or concerning the St. Louis, Lawrence and Denver Railroad Company, or the payment of any sum or sums of money thereto or therefor, or the payment by the Atlantic and Pacific Railroad Company aforesaid for or on account or on behalf of the Pacific Railroad aforesaid to the St. 36 Louis, Lawrence and Denver Railroad Company aforesaid, and when are such payments required to be made, and when and in what sums? State fully and particularly all about such matters.

Interrogatory third. Did the Pacific Railroad aforesaid and the St. Louis, Lawrence and Denver Railroad Company aforesaid ever enter into any contract or contracts? If they did, state fully and particularly the date, time of execution, terms, tenor, and effect of each of them separately, each in its order as made; state fully and particularly what moneys and what sums of money the Pacific Railroad aforesaid is or has been by such contracts, respectively, or any of them, required to pay to the St. Louis, Lawrence and Denver Railroad Company aforesaid, and when the same have or will come due, and when each ot such sums of money have or will come due, and on what terms, conditions, and contingencies any such sums of money have or will come due; and state whether the Atlantic and Pacific Railroad Company aforesaid has assumed to pay the same, or any thereof; and, if so, how and when. State all about such matters fully and particularly.

Interrogatory fourth. Is or was the Atlantic and Pacific Railroad Company indebted to *to* the St. Louis, Lawrence and Denver Railroad Company in any sum or sums of money whatever at the time

37 when these interrogatories were served on it, the Atlantic and Pacific Railroad Company aforesaid, or at any time since then or when the order for it to answer interrogatories in the above-entitled action was served on it, or at any time since then. State what payments, if any, the Atlantic and Pacific Railroad Company aforesaid has, or ought to have, since said order was served on it, made to the St. Louis, Lawrence and Denver Railroad Company aforesaid, and state when and on what terms, conditions, and contingencies any sum or sums of money has heretofore or will or may hereafter come due from either the Pacific Railroad aforesaid, or from the Atlantic and Pacific Railroad Company aforesaid, to the St. Louis, Lawrence and Denver Railroad Company aforesaid, and whether the Atlantic and Pacific Raidroad Company aforesaid has assumed or contracted to pay the same, and, if it has, when, how, and to whom, and on what terms, conditions, & contingencies, and whether the same is due, and, if not, when, and on what terms, conditions, and contingences will or may the same come due and from and to whom. State fully and particularly all about the matters aforesaid.

38 Interrogatory fifth. What sums of money have been due or owing from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company at any time since the order in the above-entitled action to the Pacific Railroad aforesaid was served on it? State fully and particularly all about such matters.

Interrogatory sixth. Has the Pacific Railroad promised or contracted to pay to the St. Louis, Lawrence and Denver Railroad Company any sum or sums of money, either for the use of any railroad or for any consideration, either absolutely or on any conditions or contingencies? State all about such matters, and when such sum and sums of money have or will come due, and state particularly all about each contract between the Pacific Railroad and the St. Louis, Lawrence and Denver Railroad Company, and the terms, tenor, and effect thereof.

Inter'ogatory seventh. State what sums of money have or will come due from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company, and when such of the same as is already due came due, and when and on what conditions and contingencies, if any, each of the other of such sums will come due.

Interrogatory eighth. What contracts have been made or entered into by or between the Pacific Railroad and the St. Louis, Law-
39 rence and Denver Railroad Company, either between themselves only or between them and some other person or persons, corporation or corporations, and what is the terms, tenor, and effect of each of such contracts, and when were the same respectively made, and what other person or persons, corporation or corporations, if any, are parties to such contracts, or any of them? State fully and particularly the terms, tenor, and effect of each of such contracts in all respects whatever, and state what sums of money have heretofore or will or may hereafter be or become due from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company on any such contract, and when the same did or will or may come due, respectively, and in what sums and on what terms, conditions, and contingencies, if any; state fully and particularly all about each and every of the matters above mentioned, and state the exact language of each of such contracts, and when and how the same were made, and whether the same is written or not, or partly written and partly printed, and annex a copy thereof to the answer to this interrogatory.

Interrogatory ninth. Has the Atlantic and Pacific Railroad Com-

pany, by contract or otherwise, assumed the payment of or contracted
to pay or perform the liabilities or contracts of the Pacific Railroad, or
any of them? If it has, state how, and when, and whether
40 by writing by it executed or not; state fully and particularly all
about such matters.

Interrogatory tenth. What contracts have been made and entered
into by and between the Pacific Railroad and the Atlantic and Pacific
Railroad Company, either between themselves only or between them
and some other person or persons, corporation or corporations, and what
is the terms, tenor, and effect of each of such contracts, and when were
the same respectively made, and what other person or persons, corpo-
ration or corporations, if any, are parties to such contracts, or any of
them? State fully and particularly the terms, tenor, and effects of each
of such contracts in all respects whatever, and state what sums of
money have heretofore or will or may hereafter be or become due from
the Atlantic and Pacific Railroad Company on or under such contracts,
respectively, and when the same did or will or may come due, respect-
ively, and in what sums and on what terms, conditions, and contingen-
cies, if any, and to whom, and which of such sums are or will be or
become due to the St. Louis, Lawrence and Denver Railroad Com-
pany; and state the exact language of each of such contracts, and when
and how the same were made, and whether the same is written or
41 not, or partly written and partly printed, and annex a copy
thereof to the answer to this interrogatory.

Interrogatory eleventh. Has the Atlantic and Pacific Railroad Company heretofore used the railroad of the St. Louis, Lawrence & Denver Railroad Company; if it has, when, and for what length of time, and on what terms, and what was it to pay therefor, and under what contract or contracts, and what are the terms, tenor, and effect of such contract and contracts, and each of them, and what sum or sums have been paid thereon, and when and to whom, and what remains unpaid, and who is to pay the same, and to whom, and when and on or under what contract or contracts; and is the Atlantic and Pacific Railroad Company to pay the same, and to whom, and when and on and under what contract or contracts? State fully and particularly all about the matters above mentioned.

June 20th, 1873.

CLOUGH & WHEAT,
Attorneys for Plaintiff.

I received the above and foregoing interrogatories on Friday, the
20th day of June, A. D. 1873, at 8 o'clock p. m. of that day, and on the
21st day of June, A. D. 1873, at 10 o'clock a. m. of that day, I served
the same, in the city of Leavenworth and county of Leavenworth,
42 in the State and district of Kansas, on the Atlantic and Pacific
Railroad Company therein mentioned, by a copy of said inter-
rogatories left at the office and usual place of business of the Atlantic
and Pacific Railroad Company aforesaid, with Dwight Byington, he
being the person having charge thereof; at which time and place I
served said interrogatories on the Atlantic and Pacific Railroad Com-
pany aforesaid, and on said Dwight Byington, by delivering said copy
thereof to said Dwight Byington personally, he being then and there
also an agent of the Atlantic and Pacific Railroad Company to sell tick-
ets of and for the Atlantic and Pacific Railroad Company aforesaid in
said county.

I could not in said district find any president, mayor, chairman of the board of directors or trustees, or other chief officers of the Atlantic and Pacific Railroad Company aforesaid, or any cashier, treasurer, secretary, clerk, or managing agent thereof.

And the railroad line thereof does and did then run in said county and district, in which county it transacts business, but it has not designated any person residing in said county or district on whom all or any process or notices issued by or from any court of record might be served, nor has it filed a certificate of any such appointment or designation in the office of the clerk of any court of or in said county or district.

W. S. TOUGH,
U. S. Marshal for the District of Kansas,
By CHAS. H. MILLER, *Deputy.*

U. S. marshal's fees for service, &c., $2.00.

43 In the circuit court of the United States for the district of Kansas.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILroad Company, defendant.

UNITED STATES OF AMERICA,
District of Kansas:

The United States of America to the Atlantic and Pacific Railroad Company:

Whereas H. S. Hopkins, the plaintiff in the a entitled action, on the 30th day of November, A. D. 1872, obtained judgment in and before the circuit court of the United States of America for the district of Kansas, sitting in Topeka, within and for said district of Kansas, against the St. Louis, Lawrence and Denver Railroad Company, the defendant in said action, for the sum of six thousand three hundred & eighty-five dollars, with interest thereon at the rate of seven per cent. per annum from the date of said judgment, and also for his costs in that action expended, which costs now amount to the sum of $292.10.

And whereas two executions have been issued on said judgment, each of which have been returned unsatisfied.

44 And whereas said plaintiff has filed in the office of clerk of said circuit court an affidavit of Lysander B. Wheat, one of the attorneys of said plaintiff in said action, therein setting forth that he has good reasons to and does believe that the Atlantic and Pacific Railroad Company above named is indebted to said defendant, therefore you, the Atlantic and Pacific Railroad Company aforesaid, are hereby commanded and required to answer, on or before Saturday the 5th day of July, A. D. 1873, all interrogatories that may be propounded by the judgment creditor aforesaid, the said H. S. Hopkins, the plaintiff in said tion, concerning such indebtedness, that is, concerning your indebtedness to the St. Louis, Lawrence and Denver Railroad Company aforesaid.

Witness Hon. Nathan Clifford, presiding justice of the Supreme Court of the United States, with the seal of said circuit court hereto affixed at Topeka, in said district, this the 19th day of June, A. D. 1873.

[SEAL.] A. S. THOMAS, *Clerk.*

I received the above and foregoing order on Friday the 20' day of June, A. D. 1873, at 8 o'clock p. m. of that day, and on the 21st day of June, A. D. 1873, at 10 o'clock a. m. of that day, I served the
45 same in the city of Leavenworth and county of Leavenworth, in the State and district of Kansas, on the Atlantic and Pacific Railroad Company therein mentioned, by a copy of said order left at the office and usual place of business of the Atlantic and Pacific Railroad Company aforesaid with Dwight Byington, he being the person having charge thereof, at which time and place I served said order on the Atlantic and Pacific Railroad Company aforesaid, and on said Dwight Byington, by delivering said copy thereof to said Dwight Byington personally, he being then and there also an agent of the Atlantic and Pacific to sell tickets of and for the Atlantic and Pacific Railroad Company aforesaid in said county. I could not in said district find any president, mayor, chairman of the board of directors, trustees, or other chief officers of the Atlantic and Pacific Railroad Company aforesaid, or any cashier, treasurer, secretary, clerk, or managing agent thereof, and the railroad line thereof does and did then run in said county and district, in which county it transacts business, but it has not designated any person residing in said county or district on whom all or any process or notices issued by or from any court of record might be served, nor has it filed a certificate of any such appointment or designation in the office of the clerk of any court of or in said county or district.

W. S. TOUGH,
46 *U. S. Marshal for the District of Kansas*,
By CHAS. H. MILLER, *Deputy*.

U. S. marshal's fees:

For service of order	$2 00
" travel on the same, one way only, 65 miles, at 6 cts	3 90
Total	5 90

(Endorsed:) No. 511. H. S. Hopkins vs. St. Louis, Lawrence & Denver Railroad Company. Order. Filed June 24, 1873. A. S. Thomas, clerk.

47 In the circuit court of the United States for the district of Kansas.

Order.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE & DENVER R. R. CO., deft.

STATE OF MISSOURI,
County of St. Louis:

I, the undersigned, Amos M. Thayer, being first duly sworn, do on oath depose and say, that on the twenty-fourth (24th) day of June, A. D. 1873, I delivered a copy of the following and hereto-annexed order and interrogatories to T. B. Edgar, he then being the president of the Pacific Railroad within named.

AMOS M. THAYER.

Subscribed in my presence and sworn to before the undersigned, Benjamin L. Hickman, a notary public in and for the county of St. Louis and State of Missouri, this 24th of June, A. D. 1873.

In witness whereof I hereto set my hand and affix my notarial seal, the day & year last aforesaid.

[SEAL.] BENJAMIN L. HICKMAN,
Notary Public, St. Louis Co., Mo.

48 In the circuit court of the United States for the district of Kansas.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD Company, defendant.

And now, H. S. Hopkins, the plaintiff in this the above-entitled action, propounds the following interrogatories to the Pacific Railroad and the officers and agents thereof:

Interrogatory first. What sums of money have been due or owing from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company at any time since the order in the above-entitled action to the Pacific Railroad aforesaid was served on it? State particularly all about such matters.

Interrogatory second. Has the Pacific Railroad promised or contracted to pay to the St. Louis, Lawrence and Denver Railroad Company any sum or sums of money, either for the use of any railroad or for any consideration, either absolutely or on any conditions or contingencies? State all about such matters, and when such sum and sums of money have or will come due, and state particularly all about each contract between the Pacific Railroad and the St. Louis, Lawrence and Denver Railroad Company, and the terms, tenor, and effect thereof.

49 Interrogatory third. State what sums of money have or will come due from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company, and when such of the same as is already due came due, and on what conditions and contingencies, if any, each of the other of such sums will come due.

Interrogatory fourth. What contracts have been made or entered into by or between the Pacific Railroad and the St. Louis, Lawrence and Denver Railroad Company, either between themselves only, or between them and some other person or persons, corporation or corporations, and what is the terms, tenor, and effect of each of such contracts, and when were the same respectively made, and what other person or persons, corporation or corporations, if any, are parties to such contracts, or any of them? State fully and particularly the terms, tenor, and effect of each of such contracts in all respects whatever, and state what sums of money have heretofore, or will or may hereafter, be or become due from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company on any such contract, and when the same did, or will, or may come due, respectively, and in what sums, and on what terms, conditions, and contingencies, if any. State fully and particularly all about each and every of the matters above mentioned, and state the 50 exact language of each of such contracts, and when and how the same were made, and whether the same is written or not, or partly written and partly printed, and annex a copy thereof to the answer to this interrogatory.

Interrogatory fifth. Has the Pacific Railroad heretofore used the railroad of the St. Louis, Lawrence and Denver R'oad Company? If it has, when and for what length of time, and on what terms, and what was it to pay therefor, and under what contract or contracts, and what are the

I received the above and foregoing order on Friday the 20’ day of June, A. D. 1873, at 8 o'clock p. m. of that day, and on the 21st day of June, A. D. 1873, at 10 o'clock a. m. of that day, I served the
45 same in the city of Leavenworth and county of Leavenworth, in the State and district of Kansas, on the Atlantic and Pacific Railroad Company therein mentioned, by a copy of said order left at the office and usual place of business of the Atlantic and Pacific Railroad Company aforesaid with Dwight Byington, he being the person having charge thereof, at which time and place I served said order on the Atlantic and Pacific Railroad Company aforesaid, and on said Dwight Byington, by delivering said copy thereof to said Dwight Byington personally, he being then and there also an agent of the Atlantic and Pacific to sell tickets of and for the Atlantic and Pacific Railroad Company aforesaid in said county. I could not in said district find any president, mayor, chairman of the board of directors, trustees, or other chief officers of the Atlantic and Pacific Railroad Company aforesaid, or any cashier, treasurer, secretary, clerk, or managing agent thereof, and the railroad line thereof does and did then run in said county and district, in which county it transacts business, but it has not designated any person residing in said county or district on whom all or any process or notices issued by or from any court of record might be served, nor has it filed a certificate of any such appointment or designation in the office of the clerk of any court of or in said county or district.

W. S. TOUGH,
46 *U. S. Marshal for the District of Kansas*,
By CHAS. H. MILLER, *Deputy*.

U. S. marshal's fees:

For service of order	$2 00
" travel on the same, one way only, 65 miles, at 6 cts	3 90
Total	5 90

(Endorsed:) No. 511. H. S. Hopkins vs. St. Louis, Lawrence & Denver Railroad Company. Order. Filed June 24, 1873. A. S. Thomas, clerk.

47 In the circuit court of the United States for the district of Kansas.

Order.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE & DENVER R. R. CO., deft.

STATE OF MISSOURI,
County of St. Louis:

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AMOS M. THAYER.

Subscribed in my presence and sworn to before the undersigned, Benjamin L. Hickman, a notary public in and for the county of St. Louis and State of Missouri, this 24th of June, A. D. 1873.

In witness whereof I hereto set my hand and affix my notarial seal, the day & year last aforesaid.

[SEAL.]

BENJAMIN L. HICKMAN,
Notary Public, St. Louis Co., Mo.

48 In the circuit court of the United States for the district of Kansas.

H. S. HOPKINS, PLAINTIFF,
vs.
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Interrogatory fourth. What contracts have been made or entered into by or between the Pacific Railroad and the St. Louis, Lawrence and Denver Railroad Company, either between themselves only, or between them and some other person or persons, corporation or corporations, and what is the terms, tenor, and effect of each of such contracts, and when were the same respectively made, and what other person or persons, corporation or corporations, if any, are parties to such contracts, or any of them? State fully and particularly the terms, tenor, and effect of each of such contracts in all respects whatever, and state what sums of money have heretofore, or will or may hereafter, be or become due from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company on any such contract, and when the same did, or will, or may come due, respectively, and in what sums, and on what terms, conditions, and contingencies, if any. State fully and particularly all about each and every of the matters above mentioned, and state the
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W. S. TOUGH,
46 *U. S. Marshal for the District of Kansas,*
By CHAS. H. MILLER, *Deputy.*

U. S. marshal's fees:

For service of order	$2 00
" travel on the same, one way only, 65 miles, at 6 cts	3 90
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(Endorsed:) No. 511. H. S. Hopkins vs. St. Louis, Lawrence & Denver Railroad Company. Order. Filed June 24, 1873. A. S. Thomas, clerk.

47 In the circuit court of the United States for the district of Kansas.

Order.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE & DENVER R. R. CO., deft.

STATE OF MISSOURI,
County of St. Louis:

I, the undersigned, Amos M. Thayer, being first duly sworn, do on oath depose and say, that on the twenty-fourth (24th) day of June, A. D. 1873, I delivered a copy of the following and hereto-annexed order and interrogatories to T. B. Edgar, he then being the president of the Pacific Railroad within named.

AMOS M. THAYER.

Subscribed in my presence and sworn to before the undersigned, Benjamin L. Hickman, a notary public in and for the county of St. Louis and State of Missouri, this 24th of June, A. D. 1873.

In witness whereof I hereto set my hand and affix my notarial seal, the day & year last aforesaid.

[SEAL.] BENJAMIN L. HICKMAN,
Notary Public, St. Louis Co., Mo.

48 In the circuit court of the United States for the district of Kansas.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD
Company, defendant.

And now, H. S. Hopkins, the plaintiff in this the above-entitled action, propounds the following interrogatories to the Pacific Railroad and the officers and agents thereof:

Interrogatory first. What sums of money have been due or owing from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company at any time since the order in the above-entitled action to the Pacific Railroad aforesaid was served on it? State particularly all about such matters.

Interrogatory second. Has the Pacific Railroad promised or contracted to pay to the St. Louis, Lawrence and Denver Railroad Company any sum or sums of money, either for the use of any railroad or for any consideration, either absolutely or on any conditions or contingencies? State all about such matters, and when such sum and sums of money have or will come due, and state particularly all about each contract between the Pacific Railroad and the St. Louis, Lawrence and Denver Railroad Company, and the terms, tenor, and effect thereof.

49 Interrogatory third. State what sums of money have or will come due from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company, and when such of the same as is already due came due, and on what conditions and contingencies, if any, each of the other of such sums will come due.

Interrogatory fourth. What contracts have been made or entered into by or between the Pacific Railroad and the St. Louis, Lawrence and Denver Railroad Company, either between themselves only, or between them and some other person or persons, corporation or corporations, and what is the terms, tenor, and effect of each of such contracts, and when were the same respectively made, and what other person or persons, corporation or corporations, if any, are parties to such contracts, or any of them? State fully and particularly the terms, tenor, and effect of each of such contracts in all respects whatever, and state what sums of money have heretofore, or will or may hereafter, be or become due from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company on any such contract, and when the same did, or will, or may come due, respectively, and in what sums, and on what terms, conditions, and contingencies, if any. State fully and particularly all about each and every of the matters above mentioned, and state the
50 exact language of each of such contracts, and when and how the same were made, and whether the same is written or not, or partly written and partly printed, and annex a copy thereof to the answer to this interrogatory.

Interrogatory fifth. Has the Pacific Railroad heretofore used the railroad of the St. Louis, Lawrence and Denver R'oad Company? If it has, when and for what length of time, and on what terms, and what was it to pay therefor, and under what contract or contracts, and what are the

terms, tenor, and effect of such contract and contracts, and each of them, and what sum or sums have been paid thereon, and when, and to whom, and what remains unpaid, and who is to pay the same, and to whom and when, and on or under what contract or contracts. State fully and particularly all about the matters above mentioned.

Dated this 20th day of June, A. D. 1873.

CLOUGH & WHEAT,
Attorneys for Plaintiff.

51 In the circuit court of the United States for the district of Kansas.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD Company, defendant.

UNITED STATES OF AMERICA,
District of Kansas:

The United States of America to the Pacific Railroad:

Whereas H. S. Hopkins, the plaintiff in the above-entitled action, on the 30th day of November, A. D. 1872, obtained judgment in and before the circuit court of the United States of America for the district of Kansas, sitting in Topeka, within and for said district of Kansas, against the St. Louis, Lawrence and Denver Railroad Company, the defendant in said action, for the sum of six thousand three hundred and eighty-five dollars, with interest thereon at the rate of seven per cent. per annum from the date of said judgment, and also for his costs in that action expended, which costs now amount to the sum of $292.10.

And whereas two executions have been issued on said judgment, each of which have been returned unsatisfied.

52 And whereas said plaintiff has filed in the office of the clerk of said circuit court an affidavit of Lysander B. Wheat, one of the attorneys of said plaintiff in said action, therein setting forth that he has good reasons to and does believe that the Pacific Railroad above named is indebted to said defendant, therefore you, the Pacific Railroad aforesaid, are hereby commanded and required to answer, on or before Saturday, the 5th day of July, A. D. 1873, all interrogatories that may be propounded by the judgment creditor aforesaid, the said H. S. Hopkins, the plaintiff in said action, concerning such indebtedness, that is, concerning your indebtedness to the St. Louis, Lawrence and Denver Railroad Company aforesaid.

Witness Hon. Nathan Clifford, presiding justice of the Supreme Court of the United States, with the seal of said circuit court hereto affixed, at Topeka, in said district, this the 19th day of June, A. D. 1873.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:) No. 511. H. S. Hopkins vs. St. Louis, Lawrence & Denver Railroad Company. Order. Filed June 26, 1873. A. S. Thomas clerk.

53 And on this day, to wit, the 25th day of November, A. D. 1873, was filed in the said clerk's office the answer of the Atlantic and Pacific Railroad to the several interrogatories propounded by the plaintiff in the said entitled cause; which said answer is in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas.

Answer of Atlantic & Pacific R. R.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD
Company.

Now comes the Atlantic & Pacific Railroad, and to the several interrogatories propounded by the plaintiff in the above-entitled cause, makes answer as follows:

Answer to the first int. There have been no sums of money due or oweing from the Atlantic & Pacific Railroad to the St. Louis, Lawrence & Denver Railroad Company at any time since the order in the above-entitled cause to the Atlantic & Pacific Railroad was served on it, or at any other time, except as hereinafter stated.

Ans. to int. 2nd. The Atlantic & Pacific Railroad has not promised or contracted to pay to the St. Louis, Lawrence & Denver Railroad
54 Company any sum or sums of money whatever, except as hereinafter stated.

Answer to interrogatory third. There have been no sum or sums of money due, and there is no sum or sums to come due, from the Atlantic & Pacific Railroad Company to the St. Louis, Lawrence & Denver Railroad Company whatever, except as hereinafter stated.

Answer to int. 4th. There was no sum or sums of money whatever due from the Atlantic & Pacific Railroad Company to the said defendant in the above-entitled cause at any time or in any manner whatever, except as hereinafter stated.

5. Answer to fifth interrogatory. There was no sum or sums of money due or coming due to said St. Louis, Lawrence and Denver Railroad Company from the Pacific Railroad Company, except as stated in the answer of said Pacific Railroad, herewith filed, at any time.

Answer to interrogatory sixth. The Pacific Railroad did not at any time contract or promise to pay said St. L., L. & D. R. R. Co. any sum or sums of money whatever, except as stated in the answer of the Pacific Railroad herewith filed & referred to.

Answer to interrogatory seventh. No sum or sums of money were due or to come due at any time from the Pacific Railroad Company to said deft. in this suit, except as stated in the answer of said Pa-
55 cific Railroad herewith filed and referred to.

Answer to interrogatory eighth. No contract was made or entered into by the Pacific Railroad with the St. Louis, Lawrence & Denver R. R. Co., except as set out fully in its answer herein, herewith filed and referred to.

Answer to interrogatory ninth. No contract has been made between said Pacific Railroad & the Atlantic and Pacific Railroad Company, except as hereinafter stated, with reference to said St. Louis, Lawrence and Denver Railroad.

Answer to interrogatory tenth. No contract has been entered into of any kind effecting the subject-matter of said interrogatory, except as hereinafter stated.

Answer to interrogatory eleventh. The Atlantic and Pacific Railroad Company has not used said St. Louis, Lawrence and Denver Railroad, except as hereinafter stated.

The Pacific Railroad, on the 29th day of June, 1862, assigned and

transferred the lease and contract held by it, under which it was operating said St. L., L. & D. R. R., to the Atlantic Pacific Railroad Company, and sold and transferred to said Atlantic and Pacific Railroad Company all its right, interest, and claim in and to all debts and demands due from said St. Louis, Lawrence and Denver Railroad Company to said Pacific Railroad, and the Atlantic and Pacific Rail-
56 road, under said assignment of said lease and contract, took possession of said railroad, and has since and is now operating the same, and in consideration of said assignment of said contract, and of all of said claims and demands ag'st said St. L., L. & D. R. R. Co., said Atlantic and Pacific Railroad Company assumed and undertook to carry out all the provisions of said lease and contract binding upon said Pacific Railroad instead of or in the place of said Pacific Railroad. And said Atlantic & Pacific Railroad, further answering, says that at the time of said assignments so made to it by the Pacific Railroad, said St. Louis, Lawrence and Denver Railroad Company was largely in debt to the said Pacific Railroad, so that by virtue of said assignment said St. Louis, Lawrence and Denver Railroad Company became indebted at that time to the Atlantic & Pacific Railroad Company, and ever since that time said debt has increased, as is shown by the answer of said Pacific Railroad herewith filed, and said St. Louis, Lawrence and Denver Railroad Company is still largely in debt to said Atlantic & Pacific Railroad Company, and reference is here made to the answer of the Pacific Railroad to the interrogatories herein filed, directed to it, and to the lease therein set out, which answer is herewith filed and made a part of this answer.

57 . Wherefore, having now fully answered, said Atlantic & Pacific Railroad Company prays to be dismissed hence, with its costs herein expended.

J. L. DEARBORN.

STATE OF MISSOURI,
County of St. Louis, ss:

J. L. Dearborn, after being duly sworn, deposes and says that he is the cashier of the Atlantic & Pacific Railroad Company, and that by virtue of his said office, and of making examinations of books, papers, & statements, he has full knowledge of the above matters, and that the statements in the foregoing answer are true, as he verily believes.

J. L. DEARBORN.

Subscribed in my presence and sworn to before me this 23d day of November, A. D. 1873. Witness my official signature and seal of office.

[SEAL.] A. L. DEAN,
Notary Public.

(Endorsed:) 511. H. S. Hopkins vs. St. Louis, Lawrence & Denver R. R. Co. Answer of Atlantic & Pacific R. R. to interrogatories. Filed Nov. 25, 1873. A. S. Thomas, clerk.

58 And on this day, to wit, the 25th day of November, A. D. 1873, came the Pacific Railroad and filed in the said clerk's office its answer to interrogatories in the said entitled cause; which said answer is in the words and figures following, to wit:

59 In the circuit court of the United States for the district of Kansas.

Answer of Pacific R. R. Co.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILroad Company, defendant.

Now comes the Pacific Railroad, and to the several interrogatories propounded by the plaintiff in the above-entitled cause, makes answer as follows:

Answer to the first interrogatory. There have been no sums of money due or owing from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company at any time since the order in the above-entitled cause to the Pacific Railroad was served on it, or at any other time, except as hereinafter fully stated.

Answer to interrogatory 2d. The Pacific Railroad has not promised or contracted to pay to the St. Louis, Lawrence and Denver Railroad Company any sum or sums of money whatever, except as hereinafter fully stated.

Answer to interrogatory third. There have no sum or sums of money due, and there are no sum or sums to come due, from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company whatever, except as hereinafter fully stated.

Answer to interrogatory fourth. There have been no contract or contracts entered into by and between the Pacific Railroad and the
60 St. Louis, Lawrence and Denver Railroad Company, or any other persons or corporation, in any affecting or respecting the matter stated in said interrogatory, except as hereinafter stated.

Answer to interrogatory fifth. The Pacific Railroad has not heretofore used the railroad of the St. Louis, Lawrence and Denver Railroad Company at any time or for any length of time whatever, under any contract or contracts, and no sums of money have been paid and no sums are unpaid, except as hereinafter fully stated.

And said Pacific Railroad, for a further answer to said interrogatories, states, that on the 14th day of June, 1870, it entered into a contract of lease with the said St. Louis, Lawrence and Denver Railroad Company; which contract of lease of said railroad is in words and figures as follows, to wit:

This lease and contract, made the 14th day of June, eighteen hundred and seventy, between the St. Louis, Lawrence and Denver Railroad Company, a corporation re-organized by consolidation under the laws of the State of Kansas and the State of Missouri, of the first part, and the Pacific Railroad of Missouri, duly incorporated by the laws of the State of Missouri, of the second part, witnesseth: That the party of the first part, in consideration of the covenants and agreements of the second part hereinafter mentioned and contained, and by
61 them to be kept and performed, and one dollar paid by the party of the second part to the party of the first part, has granted, leased, and demised, and by these presents doth grant, lease, and demise unto the party of the second part and their successors, the whole of the railroad of the party of the first part, as now located and hereafter to be built and constructed by the party of the first part, from its terminous, to wit, from the city of Pleasant Hill, in the county of Cass, State of

Missouri, thence westerly across the State line, upon the most direct and practicable route, to its terminous at the city of Lawrence, in the county of Douglass, and State of Kansas, say, fifty-eight miles, more or less, making a junction with the Leavenworth, Lawrence and Galveston Railroad at said last-mentioned city, with all the lands, railways, rails, side tracks, bridges, rights of way, depots, stations, turn-tables, water-stations, station-houses, and all other buildings and improvements and appurtenances of every nature whatsoever, now enjoyed, held or owned, or which may hereafter at any time be acquired by said party of the first part, for the purpose of operating said railroad *said railroad*, when built to be in all respects equal in quality and finish to the Pacific
Railroad of Missouri, and of a like gauge, and that the maximum
62 grade shall not exceed the maximum grade of sixty feet to a mile,
and its track shall not be laid with a rail of less weight than fifty-six (56) pounds per lineal yard, said rails to be laid with fish-plate joints, such as are now used on the Pacific Railroad, (of Missouri,) and with not less than twenty-six hundred (2,600) ties per mile; and the said party of the first part herein shall and will build and construct and finish all necessary depots, depot-grounds, stations and water-stations, cattle-guards, tracks, switches, turn-tables, side tracks, culverts, and bridges, and all and everything necessary and proper for the convenient and efficient operating of St. Louis, Lawrence and Denver Railroad, except the rolling-stock. Said depot-grounds at Lawrence are to be not less than six acres, all bridges to have necessary supports, and all over fifty (50) feet in length to be House-truss, not less than 16 feet high in the clear from the rails; to have and to hold the said demised railroad and premises as aforesaid to the Pacific Rail Company, its successors and assignees, for and during the term of thirty years from the first day of August, A. D. eighteen hundred and seventy-one, (1871,) or as much sooner as the said road shall be completed, delivered to, and accepted by
said Pacific Railroad Company, ready for operation; and, in con-
63 sideration of the premises, the parties hereto have respectively
covenanted and agreed to and with each other for themselves, their respective successors and assignees, in manner following, viz:

First. That they, the party of the first part, shall finish, provide, and pay for when payment shall be required, all the right of way for the line of said railroad, one hundred in width, and all the land for station-houses and all other buildings on the line of said railroad; shall also pay for all work to be done, and materials to be used or furnished for use in or about the location or construction of the said railroad or its appurtenances, and complete and deliver the same to the party of the second part in good condition for operating, and in all respects equal in its construction to the Pacific Railroad of Missouri, and of a like gauge therewith. But it is agreed that the said company may have not to exceed five miles in all where the right of way is not over fifty feet.

Second. That the party of the second part and its assignees shall and will at all times during the continuance of the hereby demised term, after the delivery and acceptance thereof in good faith, work, use, manage, maintain, and operate and keep in use and repair the said railroad of the party of the first part, with its appurtenances, and with such locomotion cars and rolling-stock as the said party of the second part shall deem to be necessary, reasonable, and proper for the full accom'o-
dation of the business of the road.

64 Third. That the party of the second part will, at their own cost,
employ during the continuance of the said demised term, all such superintendence and employees as shall by them be deemed necessary

to maintain, work, use, and operate said railroad hereby demised, and shall and will return and deliver up the said railroad at the expiration of the hereby demised term in good order and repair.

Fourth. The party of the second part and its assignees shall at all times during the hereby demised term have the full and exclusive right to manage and control said demised railroad and premises, and to regulate and determine the rates of tolls, freight, and charges of all the transportation over the whole or any part of the demised railroad and premises, and to charge and collect the same, and appropriate the same to their own use, and shall have, use, exercise, and enjoy all the rights, powers, and authority over the railroad aforesaid, and all the powers and privileges now possessed or which may hereafter be acquired by the party of the first part relating to the said road as herein provided, which can or may be lawfully exercised and enjoyed on and about said demised railroad and premises.

Fifth. It is further agreed that the party of the second part shall pay the party of the first part an annual rental for the use of said road of thirty-five per cent. of the gross earnings thereof for the first ten years from the acceptance of said road, and for the next twenty years
65 following the first ten, or for the period of any renewal, an annual
rental of thirty-three and a third (33⅓) per cent. of the gross earnings of said road, and in determining the gross earnings all receipts for passengers or freights over railroad shall be prorated with the Pacific Railroad solely with reference to distance of carriage upon the respective roads.

Sixth. Whereas the St. Louis, Lawrence and Denver Railroad is about to issue its first-mortgage bonds upon the said railroad for the sum of one million dollars, bearing interest at the six per cent. per annum, in gold, payable semi-annually, at the National Bank of Commerce in the city of New York; (and whereas said company has agreed to pay all taxes upon said road, and to fence the same, and make other expenditures hereinafter particularly specified:) Now, for the purpose of providing a fund sufficient to meet the said interest, (and to make the other payments referred to,) the Pacific Railroad Company covenants and agrees to pay to the said Bank of Commerce, on account of said rental, to the credit of the interest account of said St. Louis, Lawrence and Denver Railroad, the sum of sixty thousand dollars in gold annually, thirty thousand ($30,000) of which shall be paid on or before the first day of
66 May, and thirty thousand dollars ($30,000) on or before the first day
of November in each year, after the delivery to and acceptance of said road by the Pacific Railroad Company under the terms of this lease, and has also agreed to pay said company the sum of fifteen thousand dollars ($15,000) in current money, payable one-half on the first day of January, and the remainder on the first day of July, at the office of the Pacific Railroad Company, making in all the sum of seventy-five thousand dollars, ($75,000 to be paid annually during the entire period of the lease.)

And it expressly covenanted and agreed that if the said sum of sixty thousand dollars, ($60,000) in gold, with the premium thereon, and fifteen thousand dollars in currency should amount to more than the amount to the credit of the St. Louis, Lawrence and Denver Railroad Company, as rental, upon the percentage of gross receipts hereinbefore specified, the excess paid by the said Pacific Railroad Company, with the premiums paid for gold, shall be charged to said St. Louis, Lawrence and Denver Railroad Company, and shall bear interest at the rate of ten per cent. per annum until such percentage of gross receipts shall itself be suffi-

cient to provide for the annual payment of said sum of sixty
67 thousand dollars ($60,000) in gold and fifteen thousand dollars in
currency, and thereafter any surplus to the credit of the St. Louis, Lawrence and Denver Railroad Company over and above the amount required shall be retained by the Pacific Railroad Company (of Missouri) until the amounts so advanced, with premiums and interest at the rate of ten per cent., shall have been fully re-imbursed to said company; and it is expressly stipulated and agreed that until all amounts so advanced by said Pacific Railroad Company shall be fully re-imbursed and paid said Pacific Railroad Company shall have a lien upon the road and franchises of said St. Louis, Lawrence and Denver Railroad Company to the amount of such advance and interest, and no incumbrance, mortgage, or lien of any kind or character, except the said mortgage for one million dollars, shall be placed upon said road, without the consent of the board of directors of the Pacific Railroad for the time being, until all the amounts so due shall be fully satisfied and paid.

It is expressly agreed that for any fractional portion of a period of six months elapsing between the acceptance of said railroad and the
maturity of the first interest-payment thereafter on the first-mort-
68 gage bonds, said Pacific Railroad shall pay only a pro rata share
in accordance with the time so elapsing.

Seventh. It is further agreed that for the first fifteen years of this lea*n*, the tariff or rates of freight charged between St. Louis and Lawrence shall not exceed regular tariff rates per mile on freight between St. Louis and other railway competing points unaffected by said competition, and the total rates charged shall in no case exceed by more than thirty (30) per cent. th*an* that *on* at the same time charged between St. Louis and Kansas City, but this clause shall not apply to any local freights, nor to any freights destined to points west of Lawrence.

Eighth. It is further agreed by said parties of the first and second part, that the said party of the first part and their successors shall and will, whenever *whll* required by the party of the second part, or their successors, during the continuance of the hereby-demised term, or any renewal thereof, do and perform any and every corporate act which may be necessary, useful, and appropriate to secure the said party of the second part, or their successors, the full enjoyment of the premises hereby demised, and of every franchise, right, and privilege connected
therewith or appertaining to the same, now possessed, or which
69 may be hereafter possessed, by the party of the first part or their
successors, and hereby granted or intended to be granted to the party of the second part and their successors under this instrument.

Ninth. And it is further agreed and understood that the said party of the first part shall pay all taxes and assessments at any time hereafter imposed under the authority of the United States, State, county, or city laws, upon the whole or any part of said road, its buildings or appurtenances, hereby demised, and also all taxes which may hereafter be imposed by authority of law, either Federal or State, upon the capital stock and the dividend thereon, or upon their bonds or interest thereon, which said party of the first part are or may be liable to pay, and also the interest and principal of any bonds or other debts incurred by the party of the first part when the same shall mature; and in case of the neglect or refusal of said party of the first part to pay said taxes and liabilities which may be or can be collected by levy on said railroad, then said party of the second part shall be authorized to pay said taxes and demands, and shall deduct the amount so paid for taxes, &c., from said semi-annual payments in currency, as they may become due; and the

receipts for said payments so made by said party of the second
70 part shall be taken by said party of the first part on account of
such payment to the extent aforesaid.

Tenth. That if any difference shall hereafter arise in relation to this lease, or contract, or duties, rights or privileges, of either of the parties thereunder, each of the parties shall elect a referee of experience and skill in railway matters and management, and the referee so selected shall choose a third of like experience and skill in railway matters and management, and the three so chosen shall hear and decide such differences, and their decision, or that of the majority of them, shall be final and conclusive upon said parties.

Eleventh. And it is understood and agreed by and between the parties hereto that the rents hereinbefore mentioned to be paid by the party of the second part to party of the first part shall commence from the time of the formal delivery to and acceptance of said road by the party of the second part.

Twelfth. It is further agreed and understood between the parties that the party of the first part shall fence the said road with a good and sufficient fence, of such height as may be required by the laws of Kansas
and Missouri, and one-third part of said fence shall be erected
71 within two years, one-third part additional within four years,
and the whole within six years from the date of the acceptance of said road by the party of the second part. The general superintendent of said sec. party shall designate the parts of said road which shall first be fenced. But if the said Pacific Railroad Company shall deem the erection of such fence necessary before the period named, said company shall have the right to erect the same, and to charge the cost thereof, with interest at the rate of ten per cent. per annum, to said party of the first part, to be re-imbursed out of its proportion of gross receipts, as provided in section sixth, (6.)

And it is further stipulated and agreed that, at the termination of the term of thirty years herein provided for, the said Pacific Railroad Company shall have the right, if it shall so elect, to renew said lease for the full term of thirty years then next ensuing, upon the same terms and conditions as are herein provided for the last twenty years of the term herein demised; and the said St. Louis, Lawrence and Denver Railroad Company hereby covenants and agrees, upon the demand of said Pacific Railroad Company, to execute and deliver all such additional deeds and
assurances as may be necessary or proper to fully and effectually
72 vest in the said Pacific Railroad Company during such renewal
all rights and privileges vested in said company for the term hereby demised.

And the terms of this lease having been satisfied by the stockholders of the respective companies, parties hereto, have caused the same to be executed in duplicate, by having signed by their respective presidents, and their corporate seals to be applied, this 24th day of October, A. D. 1870.

(Signed) PACIFIC RAILROAD,
[SEAL.] By H. E. BRIDGE, *Prest.*
JNO. C. PORTER,
Secy. P. R. R.
THE ST. LOUIS, LAWRENCE AND DENVER R. R. CO.,
[SEAL]. By GEORGE W. DEITZLER, *President.*

And the said Pacific Railroad, farther answering, says that it accepted said St. Louis, Lawrence and Denver Railroad, and the same was turned

over to the Pacific Railroad, under the terms and provisions of said
lease, on the 22nd day of December, A. D. 1871, at which time the rental
for said railroad commenced to run and accumulate, and payments
73 of said rental have been made as follows:

May 3rd, 1872,	gold	$7,216 33
July 1st, "	currency	7,500 00
Oct. 31st, "	gold	30,000 00
Jan. 1st, 1873,	currency	7,500 00
April 30th, 1873,	gold	30,000 00
"	currency	7,500 00
		$90,216 33

Making in all—	gold	$67,216 33
	currency	23,000
		90,216 33

And said Pacific Railroad farther shows that all of said payments so made as above set out were made by the treasurer and cashier of said company prior to the service of said order of garnishment or notice of the same; and further answering, saith that under and by the provisions of said contract and lease, as above set out, the rental of said demised railroad to be paid to said St. Louis, Lawrence and Denver Railroad Company was to be thirty-five per cent. of the gross earnings of said demised railroad; and said Pacific says that the said amount of eighty-nine thousand seven hundred and sixteen dollars was largely in excess of said thirty-five per cent. of said gross earnings up to this time, to wit,
in the amount of dollars, and that said amount so paid in ex-
cess constitutes a debt and obligation due from said St. Louis,
74 Lawrence and Denver Railroad Company to said Pacific Railroad.

And said Pacific Railroad, farther answering, says that the time has long since elapsed provided in said contract and lease when said St. Louis, Lawrence and Denver Railroad Company should, by the terms of said contract, have fenced one-third of said railroad so demised, and said company has wholly failed to comply; wherefore said company has become liable to and indebted to the Pacific Railroad in the sum of nineteen thousand dollars, or at the rate of one thousand dollars a mile for one-third of the length of said railroad; wherefore, any sums of the said large advances made to said defendant in said suit in excess of thirty-five per cent. of said gross earnings, and of said failure to construct said fence as in said contract provided, said defendant became largely indebted to said Pacific Railroad prior to and since the service of the order of garnishment having, to wit, in the sum of dollars.

And the Pacific Railroad, further answering, says that on the 29th
day of June, 1872, *at* assigned said lease and contract, and all claims un-
der the same ag'st the St. L., L. & D. R. R. to the Atlantic and
75 Pacific Railroad Company, which last-named company has, since
said time, been operating and managing said demised railroad,
and has undertaken to fulfil the obligations in said regard of said Pacific
Railroad, as will more fully appear from the answer herein filed of said
Atlantic & Pacific Railroad.

And said Pacific Railroad, having now fully answered, prays that it may be discharged hence, with its costs herein.

J. L. DEARBORN.

STATE OF MISSOURI,
County of St. Louis, ss:

John L. Dearborn, after being duly sworn, deposes and says that he is secretary and treasurer of the Pacific Railroad, and by virtue of his said office, and of examination of books, papers, statements, and accounts in regard to said matters, he has knowledge of the matters contained in the foregoing answer, and he says that the matters therein contained are true, as he verily believes.

J. L. DEARBORN.

Subscribed in my presence and sworn to before me this 23rd day of November, A. D. 1873. Witness my official signature and seal of my office.

[SEAL.]

A. L. DEANE,
Notary Public.

76 (Endorsed:) No. 511. H. S. Hopkins vs. The St. Louis, L. & D. R. R. Company. Answer of the Pacific Railroad to interrogatories. Filed Nov. 25th, 1873. A. S. Thomas, clerk.

77 And on this day, to wit, the 28th day of November, A. D. 1873, came the plaintiff, by Clough & Wheat, his attorneys, and filed in the said clerk's office his statement that answers are not satisfactory in the said-entitled cause; which said statement is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Kansas, ss:

Statement, &c.

In the circuit court of the United States for the district of Kansas.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD Company, defendant.

And now comes H. S. Hopkins, the plaintiff in this the above-entitled action, and says that he is not satisfied with the answer of the Pacific Railroad heretofore in its behalf as a garnishee filed herein, and that said answer is not satisfactory to said plaintiff; and that he is not satisfied with the answer of the Atlantic and Pacific Railroad Company heretofore in its behalf as a garnishee filed herein; and that the last-mentioned answer is not satisfactory to said plaintiff, and that said plaintiff is not satisfied with any or either of the answers to any or either of the several interrogatories heretofore filed herein. 78

November 28th, 1873.

CLOUGH & WHEAT,
Attorneys for Plaintiff.

(Endorsed:) 511. H. S. Hopkins vs. St. Louis, Lawrence & Denver R. R. Co. Statement that answers are not satisfactory. Filed Nov. 28, 1873. A. S. Thomas, clerk.

And on this day, to wit, the 2nd day of December, A. D. 1873, came the said plaintiff, by Clough & Wheat, his attorneys, and filed in the said clerk's office his motion for order against garnishees, etc., in said entitled cause; which said motion, &c., is in the words and figures following, to wit:

Motion for order, &c.

In the circuit court of the United States for the district of Kansas.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD Company, defendant.

And now comes the above-named plaintiff, and states and says that the answers of the garnishees herein are not, nor is either of them, satisfactory to said plaintiff; and, not waiving such objections, said plaintiff moves the court for an order against each of said garnishees that they each of them be forthwith required to pay into this court the amount of the judgment and costs in this action.

79 CLOUGH & WHEAT,
Attorneys for Plaintiff.

(Endorsed:) 511. H. S. Hopkins vs. St. Louis, Lawrence and Denver R. Rd. Co. Mo. for order agt. garnishees, etc. Filed Decr. 2, 1873. A. S. Thomas, clerk.

And on this day, to wit, the 2nd day of December, A. D. 1873, was filed in the said clerk's office a motion to discharge Pacific R. R. Co. in the said entitled cause; which said motion, &c., is in the words and figures following, to wit:

Motion to discharge Pacific R. R.

In the circuit court of the U. S. for the dist. of Kansas.

HENRY HOPKINS
vs.
ST. LOUIS, LAWRENCE & DENVER RAILROAD CO.

And now comes the Pacific Railroad, who has been summoned as garnishee in the above case, and who has fully answered the inter'ogatories therein propounded, and move the court to discharge it from further answering, &c., and for cause of such motion shows to the court here the following:

1st. It appears from the answer, which is not denied, that this garnishee is in nowise indebted to the said plaintiff, and has no money, property, or other thing in its possession or under its control belonging to the above defendant. 80

JAMES BAKER,
Atty. for Garnishee.

(Endorsed:) 511. Hopkins vs. St. Louis, Lawrence & Denver R. R. Co. Motion to discharge Pacific R. R. Co. Filed Dec. 2, 1873. Baker. A. S. Thomas, clerk.

And on this day, to wit, the 2nd day of December, A. D. 1873, was filed in the said clerk's office a motion to discharge A. & P. R. R. Co. as garnishee in the said entitled cause; which said motion, &c., is in the words and figures following, to wit:

Motion to discharge A. & P. R. R. Co.

In the circuit court of the U. S. for the dist. of Kansas.

HENRY S. HOPKINS
vs.
ST. LOUIS, LAWRENCE & DENVER RAILROAD CO.

And now comes the Atlantic & Pacific Railroad Company, who has been summoned as garnishee in the above case, and who has fully answered the inter'ogatories therein propounded to it, and moves the court here to discharge it, with its reasonable costs, and for cause of such motion shows to the court here the following: It appears from the answer, which is not denied, that this garnishee is in nowise in-81 debted to the said plff., and has no property, money, or other valuable thing belonging to said defendant in its possession or under its control.

JAMES BAKER,
Atty. for Garnishee.

(Endorsed:) 511. Hopkins vs. St. Louis, Lawrence & Denver R. R. Co. Motion to discharge A. & P. R. R. Co. as garnishee. Filed Dec. 2, 1873. A. S. Thomas, clerk. Baker.

At a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 24th day of November, A. D. 1873—present, honorable John F. Dillon, judge—the following proceedings, among others, were had, and appear of record in the words and figures following, to wit:

Journal-entry.

TUESDAY, *December 2d*, 1873.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILROAD Company, defendant. 511.

And now comes the plaintiff herein, by Clough & Wheat, his attorneys, and also comes the defendant herein, by John P. Usher, as its attorney, and also come the Atlantic and Pacific Railroad Com-82 pany and the Pacific Railroad, garnishees herein, by J. Baker, their attorney, and respectively move the court to be discharged as such garnishees herein; and thereupon said plaintiff states that he is not satisfied with the answers herein of said garnishees, and that the answers herein of the Atlantic and Pacific Railroad Company and the Pacific Railroad are not, nor is either of them, satisfactory to him, the said plaintiff; and without waiving that objection, said plaintiff moves the court to order each of said garnishees, the Atlantic and Pacific Railroad Company and the Pacific Railroad, as garnishees herein, to forthwith pay into this court the amount of the judgment heretofore rendered in this action in favor of said plaintiff against said defendant; and said motions being all argued the court takes the matter of the motions aforesaid under advisement.

Journal-entry.

THURSDAY, *December 4th*, 1873.

H. S. HOPKINS, PLAINTIFF,
vs.
SAINT LOUIS, LAWRENCE AND DENVER RAILroad Company, defendant.
} 511.

And now comes the plaintiff herein, by Clough & Wheat, his attorneys, and also comes the defendant herein, by John P. Usher, its attorney, and also come the Pacific Railroad and the Atlantic and Pacific
83 Railroad Company, garnishees herein, by T. A. Hurd, their attorney, and the court having duly considered the answers of said garnishees, heretofore filed herein, and the arguments of counsel thereon, on consideration thereof finds that the sum of seven thousand and five-hundred dollars, part of the annual payment of $15,000.00, will come due to the said defendant on the first day of January next from the Pacific Railroad aforesaid, on the lease dated of the 14th day of June, A. D. 1870, mentioned in the answers herein of the Pacific Railroad aforesaid as such garnishee, and that the Atlantic and Pacific Railroad Company aforesaid has assumed the payment thereof.

It is, therefore, now by the court here considered, ordered, and adjudged that said garnishees, the Pacific Railroad and the Atlantic and Pacific Railroad Company aforesaid, as garnishees herein, pay into this court, to the clerk thereof, on the first day of January next, so much of said sum of seven thousand and five hundred dollars as it will require to pay and discharge the judgment heretofore, and on the thirtieth day of November, A. D. 1872, rendered herein in favor of said plaintiff against said defendant, that is, the sum of six thousand three hundred and eighty-five dollars, with interest thereon at the rate of seven per cent. per annum from the said thirtieth day of November, A. D. 1872, and the costs by said plaintiff in this action expended, and that execution
84 issue therefor if they neglect to make such payment on that first day of January, A. D. 1874; and that on such payment being made herein to said clerk by said garnishees, or either of them, the said garnishees are to both stand and be discharged herefrom without costs against them or either of them; but if they fail to make such payment on said first day of January next, then such execution is to be issued and enforced against said garnishees and their and each of their property at their costs. To this order and judgment said garnishees except.

Journal-entry.

FRIDAY, *December* 5, 1873.

H. S. HOPKINS, PLAINTIFF,
vs.
ST. LOUIS, LAWRENCE AND DENVER RAILroad Company, defendant.
} 511.

And now again comes the plaintiff herein, by Clough & Wheat, his attorneys, and on his motion it is now by the court here ordered that the clerk of this court pay to said plaintiff, on request therefor, so much of all such sums of money as shall be paid into this court to him as such clerk thereof, in pursuance of any order or judgment heretofore made in this action against the garnishees herein as shall not be re-

85 quired for the payment of such, if any, of the plaintiff's costs herein as shall then remain unpaid.

And on this day, to wit, the 26th day of January, A. D. 1874, came the Pacific Railroad Company and the Atlantic and Pacific Railroad Company, by J. P. Usher, their attorney, and filed in the said clerk's office an appeal-bond and affidavit of justification by sureties in the said entitled cause; which said appeal-bond and affidavit of justification by sureties are in the words and figures following, to wit:

Bond.

Know all men by these presents that we, the Pacific Railroad Company, the Atlantic & Pacific Railroad Company, John P. Usher, & John W. McMillan, of the city and county of St. Louis, in the State of Missouri, are held and firmly bound unto H. S. Hopkins in the just and full sum of fifteen thousand dollars, to be paid unto the said H. S. Hopkins, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our, and each of our executors, heirs, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 20th day of January, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas, lately, at a circuit court of the United States in and for the district of Kansas, in a suit depending in said court between H. S. Hopkins and the St. Louis, Lawrence and Denver Railroad Company, 86 the Pacific Railroad Company, and the Atlantic and Pacific Railroad Company, a judgment was rendered against the said Pacific Railroad Company and Atlantic and Pacific Railroad Company, and the said St. Louis, Lawrence and Denver Railroad Company, Pacific Railroad Company, and Atlantic and Pacific Railroad Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment aforesaid in the said suit, and a citation, directed to the said H. S. Hopkins, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on *on* the second Monday of October next:

Now, the condition of the above obligation is such that if the said St. Louis, Lawrence and Denver Railroad Company, Pacific Railroad Company, and Atlantic and Pacific Railroad Company shall prosecute such writ of error to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

PACIFIC RAILROAD CO.,
By T. B. EDGAR, *Prest.*
ATLANTIC & PACIFIC R. R.,
By A. PIERCE, *Vice-Prest.*
J. P. USHER. [SEAL.]
J. W. McMILLAN. [SEAL.]

Approved by me this 20' day of January, A. D. 1874.

JOHN F. DILLON,
Circuit Judge

87 (Endorsed:) No. 511. St. Louis, Lawrence and Denver Railroad Company, pl'ff in error, vs. H. S. Hopkins, def't in error. Bond in writ of error. Filed Jan'y 26, 1874. A. S. Thomas, clerk.

Affidavit of justification by sureties.

Circuit court of the United States, district of Kansas.

H. S. HOPKINS, PLAINTIFF, *vs.* THE ST. LOUIS, LAWRENCE AND DENVER Railroad Company et al., defendants.	At law. Affidavit of justification of sureties.

STATE OF KANSAS,
County of Douglas, ss:

We, John P. Usher & J. W. McMillan, both of Lawrence, in the county of Douglas, in said State of Kansas, being duly sworn, upon our oaths, say:

I. And first, I, the said John P. Usher, for myself, say that I am a resident of the State of Kansas, and worth the sum of fifteen thousand dollars over & above all exemptions, debts, & liabilities.

II. And second, I, the said J. W. McMillan, for myself, say that I am a resident of the State of Kansas, & worth the sum of fifteen thousand dollars over & above all exemptions, debts, & liabilities.

J. P. USHER.
J. W. McMILLAN.

The above-named John P. Usher & J. W. McMillan severally subscribed & were duly sworn to the above affidavit this 16th day of January, A. D. 1874, before me.

E. D. HAMMOND, [SEAL.]
88 *Notary Public.*

(Endorsed:) No. 511. Circuit court of the United States, district of Kansas. H. S. Hopkins vs. The St. Louis, Lawrence & Denver Railroad Company et al. Affidavit of justification by sureties. J. P. Usher, def't's attorney, Lawrence, Kas. Filed January 26, 1874. A. S. Thomas, clerk.

89 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy of the record and proceedings containing the judgments and orders in the therein entitled cause of H. S. Hopkins against St. Louis, Lawrence and Denver Railroad Company, as the same remain and are of record in my office as clerk of said circuit court, and hereto annexed is the writ of error and citation filed in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 11th day of March, A. D. 1874.

A. S. THOMAS, *Clerk.*

Costs for making transcript, $20.00.

90 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the circuit court of the United States in and for the district of Kansas, and to honorable John F. Dillon, judge of the said court, greeting:

Because in the record and proceedings and pleadings, as also in the rendition of the judgment against the Atlantic and Pacific Railroad Company and the Pacific Railroad Company, garnishees, in a proceeding in garnishment, under a judgment and proceeding in the said circuit court before you, between H. S. Hopkins, plaintiff, and the St. Louis, Lawrence and Denver Railroad Company, defendant, and the said Atlantic and Pacific Railroad Company and the Pacific Railroad Company, as such garnishees, a manifest error has happened and great damage of the said Atlantic and Pacific Railroad Company and the Pacific Railroad Company, as by the complaint appears:

91 We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. one thousand eight hundred and seventy-four, in the Supreme Court then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Hon. Nathan Clifford, justice of the said Supreme Court, the twelfth day of December, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] A. S. THOMAS, *Clerk*,

Clerk of the circuit court of the United States for the district of Kansas.

92 Issued at the office of the clerk of the circuit court at Topeka, in said district. In testimony whereof the said clerk hereto sets his hand and affixes the seal of said circuit court the day and year last above written.

[SEAL.] A. S. THOMAS, *Clerk*.

(Indorsed:) H. S. Hopkins vs. St. Louis, Lawrence & Denver Railroad. Writ of error. Filed Dec. 12th, 1873. A. S. Thomas, clerk.

93 The United States of America to H. S. Hopkins:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the district of Kansas, wherein the St. Louis, Lawrence and Denver Railroad Company and the Atlantic and Pacific Railroad Company and the Pacific Railroad Company are plaintiff' in error, and you are defendant in error, to show cause, if any there be, why the judgment in said suit, in said writ of error mentioned, should not be corrected, and why speedy justice should not be done.

Witness the Hon. John F. Dillon, one of the judges of the circuit court of the United States in and for the district of Kansas, this twelfth pay of December, A. D. 1873.

JOHN F. DILLON,
Circuit Judge.

94 UNITED STATES OF AMERICA,
District of Kansas:

On this 20th day of December, in the year of our Lord one thousand eight hundred and seventy-three, personally appeared T. A. Hurd before me, the subscriber, and makes oath that, *one oath that* at the city of Leavenworth, in the State of Kansas, and within the district of Kansas, on the 19th day of December, A. D. 1873, he delivered a true copy of the within citation to L. B. Wheat, esq., one of the attorneys for H. S. Hopkins, the within named defendant in error.

T. A. HURD.

Sworn and subscribed December 20th, A. D. 1873.

CHAS. MONROE,
Notary Public.

(Indorsed:) 511. E. The St. Louis, Lawrence and Denver Railroad Company et al., pl'ff in error, *vs.* H. S. Hopkins, d'ft's in error. Citation. Filed Dec. 22, 1873. A. S. Thomas, clerk.

(Indorsed on cover:) No. 145. Kansas C. C. U. S. The Atlantic and Pacific Railroad Company et al., plaintiffs in error, vs. H. S. Hopkins. Filed 14th October, 1874.

◆

In the Supreme Court of the United States,

THE ATLANTIC & PACIFIC RAILROAD COMPANY AND THE
PACIFIC RAILROAD COMPANY,
Plaintiff in Error.
vs.
H. S. HOPKINS, *Defendant in Error.*

POINTS.

I.

The Court erred in proceeding to render final judgment against plaintiffs in error, over their motions to be discharged. (Abstract, p. 8).

Their answers showed that they were not "*indebted*" to the "judgment debtor;" and whether either of the plaintiffs in error ever would be, depended entirely upon the contingency whether they or either of them should continue in the possession of the railroad of the judgment debtor until the first day of January then next, and if it should happen that such possession should continue, then, upon what sums they should pay for taxes, and what for fencing or what allowance should be made for damages for want of the fence. The statutes of Missouri (*Wagner's St. 1872, sec. 43 p. 310*), required railroad companies to fence their roads. Evidently the rent or value of a railroad not fenced, is not equal to a railroad fenced. The difference in rental value may have been equal to the sum which it was supposed would have been payable 1st January.

II.

The Court erred in its finding of December 2, 1873, that $7,500 would be due on the 1st January, 1874, for the rent of the railroad to said last date.

Whether or not such sum would be due depended upon contingencies which the Court was not justified in finding certain to occur.

III.

The Court erred in rendering final judgment to take effect at a future day, not for a sum certain, but to be ascertained by the computation of one or more not named, and in giving judgments for executions for such uncertain sum.

IV.

The judgment of the Court was contrary to the statute and laws of Kansas, as construed by the Supreme Court of Kansas in *Scovill's case, 13 Kan. 17*, in this:

1. That the Court by its said judgment assumed to decide, and did decide, that the plaintiffs in error, over their denials and protests, *would owe* the judgment debtor on the 1st January then next, a sum of money, thus depriving them of their right to trial by jury, which is decided to be contrary to the Bill of Rights.

2. That said Court assumed to render *final* judgments against the plaintiffs in error, for money not then due and payable, whereas, by the decision in *Scovill's* case, the Court had no power to enter *final* judgment against the plaintiffs in error.

3. This case also decides that the statute empowering the Court to enfore its order to the plaintiff in error, to pay money into Court, by attachment (or execution), is unconstitutional.

4. If the plaintiffs in error had owed the judgment debtor a liquidated debt not due, the power of the Court was limited to an *order* to pay the same to the creditor when due, and if not then paid such creditor had a right of action for the money. The effect of such order, says the Court, is *only an assignment of the claim from the debtor to the creditor.*" "The creditor gains no other rights than the debtor had, *and the garnishee loses no rights.*"

V.

Rent not yet payable could not be the subject of garnishment, being incident to the reversion and thus part of the reality. *See authorities in brief.*

VI

It follows that the judgment for execution was unauthorized and erroneous, and the plaintiffs in error have the right to prosecute their writ for the reversal of the same.

J. P. USHER,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States,

THE ATLANTIC & PACIFIC RAILROAD COMPANY, and
THE PACIFIC RAILROAD COMPANY,
Plaintiffs in Error,
vs.
H. S. HOPKINS,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

In the Circuit Court of the United States,

THE ATLANTIC & PACIFIC RAILROAD COMPANY AND THE
PACIFIC RAILROAD COMPANY,
Plaintiff in Error.
VS.
H. S. HOPKINS, *Defendant in Error.*

ABSTRACT OF RECORD.

On November 30th, 1872, Hopkins obtained a judgment in the United States Circuit Court for the district of Kansas, against the St. Louis, Lawrence & Denver Railroad Company, for $6385.00 and costs (record, p. 10), and issued execution thereon, which was returned unsatisfied. (Id. p. 11).

Then garnishee summons were issued against each of the plaintiffs in error, and interrogatories administered, to which they filed in due course answers under both. (Record, p. 21, 23).

The material parts of the answer of the Pacific Railroad company (record, p. 23), are as follows:

1. "There have been no sums of money due or owing from the Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company at any time since the order in the above entitled cause to the Pacific Railroad was served on it, or at any other time, except as hereinafter fully stated.

2. "The Pacific Railroad has not promised or contracted to pay to the St Louis, Lawrence and Denver Railroad company any sum or sums of money whatever, except as hereinafter fully stated.

3. "There have been no sum or sums of money due, and there are no sum or sums to come due, from the

Pacific Railroad to the St. Louis, Lawrence and Denver Railroad Company whatever, except as hereinafter fully stated.

4. "There have been no contract or contracts entered into by and between the Pacific Railroad and the St. Louis, Lawrence and Denver Railroad Company, or any other persons or corporation, in any way affecting or respecting the matter stated in said interrogatory, except as hereinafter stated.

5. "The Pacific Railroad has not heretofore used the railroad of the St. Louis, Lawrence and Denver Railroad Company at any time or for any length of time whatever, under any contract or contracts, and no sums of money have been paid and no sums are unpaid, except as hereinafter fully stated.

And said Pacific Railroad, for a further answer to said interrogatories, states, that on the 14th day of June, 1870, it entered into contract of lease with the said St. Louis, Lawrence and Denver Railroad Company."

Lease is of the railroad of the St. Louis, Lawrence and Denver Railroad Company, about fifty-nine miles in length, from Pleasant Hill, in Missouri, to Lawrence, in Kansas, for thirty years from the first day of August, A. D. eighteen hundred and seventy-one (1871).

The provisions of the lease, as to rental, &c., are as follows:

"Fifth. It is further agreed that the party of the second part" [the Pacific Railroad] "shall pay to the party of the first part" [the St. Louis, Lawrence and Denver Railroad Company] "an annual rental for the use of said road of thirty-five per cent of the gross earnings thereof for the first ten years from the acceptance of said road, and for the next twenty years following the first ten, or for the period of any renewal, an annual rental of thirty-three and a third (33⅓) per cent. of the gross earnings of said road.

"Sixth. Whereas the St. Louis, Lawrence, and Denver Railroad is about to issue its first-mortgage bonds upon the said railroad for the sum of one million dollars, bearing interest at the rate of six per cent. per annum, in gold, payable semi-annually, at the National Bank of Commerce in the city of New York; (and whereas said company has agreed to pay all taxes upon said road, and to fence the same, and make other expenditures hereinafter particularly specified): Now, for the purpose of providing a fund sufficient to meet the said interest (and to make the other payments referred to), the Pacific Railroad Company covenants and agrees to pay to the said Bank of Commerce, on account of said rental, to the credit of the interest account of said St. Louis, Lawrence and Denver Railroad, the sum of sixty thousand dollars in gold annually, thirty thousand ($30,000) of which shall be paid on or before the first day of May, and thirty thousand ($30,000) on or before the first day of November in each year, after the delivery to and acceptance of said road by the Pacific Railroad Company under the terms of this lease, and has also agreed to pay said company the sum of fifteen thousand dollars ($15,000) in current money, payable one-half on the first day of January, and the remainder on the first day of July, at the office of the Pacific Railroad Company, making in all the sum of seventy-five thousand dollars ($75.000) to be paid annually during the entire period of the lease.

"And it is expressly covenanted and agreed that if the said sum of sixty thousand dollars ($60,000) in gold, with the premium thereon, and fifteen thousand dollars in currency should amount to more than the amount to the credit of the St Louis, Lawrence and Denver Railroad Company, as rental, upon the percentage of gross receipts hereinbefore specified, the excess paid by the said Pacific Railroad Company, with the premiums paid for gold, shall be charged to said St. Louis, Lawrence and Denver Railroad Company, and shall bear interest at the rate of ten per cent. per annum until such percentage of gross receipts shall itself be sufficient to provide for the annual payment of said sum of sixty thousand dollars ($60,000) in gold and fifteen thousand dollars in currency, and thereafter any surplus to the credit of the St. Louis, Lawrence and Denver Railroad Company over and above the amount required shall be retained by the Pacific Railroad Company (of Missouri), until the amounts so advanced, with premiums and interest at the rate of ten per cent., shall have been fully reimbursed to said company; and it is expressly stipulated and agreed that until all amounts so advanced by said Pacific Railroad Company shall be fully reimbursed and paid said Pacific Railroad Company shall have a lien upon the road and franchises of said St. Louis, Lawrence and Denver Railroad Company to the amount of such advance and interest, and no incumbrance, mortgage, or lien of any kind or character, except the said mortgage for one million dollars, shall be placed upon said road, without the consent of the board of directors of the Pacific Railroad for the time being, until all amounts so due shall be fully satisfied and paid.

"Ninth. And it is further agreed and understood that *the said party of the first part shall pay all taxes and assessments* at any time hereafter imposed under the authority of the United States, State, county, or city laws, upon the whole or any part of said road, its buildings or appurtenances, hereby demised, and also all taxes which may hereafter be imposed by authority of law, either Federal or State, upon the capital stock and the dividend thereon, or upon their bonds and interest thereon, which said party of the first part are or may be liable to pay, *and also the interest and principal of any bonds or other debts incurred by the party of the first part when the same shall mature; and in case of the neglect or refusal of said party of the first part to pay said taxes and liabilities which may be or can be collected by levy on said railroad, then said party of the second part shall be authorized to pay said taxes and demands, and shall deduct the amount* so paid for taxes, &c., *from said semi-annual payments in currency as they may become due;* and the receipts for such payments so made by said party of the second part shall be taken by said party of the first part on account of such payment, to the extent aforesaid.

"Twelfth. It is further agreed and understood between the parties that the party of the first part shall fence the said road with a good and sufficient fence, of such heigth as may be required by the laws of Kansas and Missouri, and one-third part of said fence shall be erected within two years, one-third part additional within four years, and the whole within six years from the date of the acceptance of said road by the party of the second part. The general superintendent of said sec. party shall designate the parts of the road which shall first be fenced. But if the said Pacific Railroad Company shall deem the erection of such fence necessary before the period named, said company shall have the right to erect the same, and to charge the cost thereof, with interest at the rate of ten per cent. per annum, to said party of the first part, to be reimbursed out of its proportion of gross receipts, as provided in section sixth (6).

"And the said Pacific Railroad, farther answering, says that it accepted said St. Louis, Lawrence and Denver Railroad, and the same was turned over to the Pacific Railroad, under the terms and provisions of said lease, on the 22nd day of December, A. D. 1871, at which time the rental for said railroad commenced to run and accumulate, and payments of said rental have been made as follows:

May 3d, 1872, gold,	$7,216.33
July 1st, " currency,	7,500.00
Oct. 31st, " gold,	30,000.00
Jan. 1st, 1873, currency,	7,500.00
April 30th, 1873, gold,	30,000.00
" currency,	7,500.00
	$90,216.33

Making in all—gold,	$67,216.33
currency,	23,000.00
	$90,216.33

"And said Pacific Railroad farther shows that all of said payments so made as above set out were made by the treasurer and cashier of said company prior to the service of said order of garnishment or notice of the same; and further answering, saith that under and by the provisions of said contract and lease, as above set out, the rental of said demised railroad to be paid to said St. Louis, Lawrence and Denver Railroad Company was to be thirty-five per cent. of the gross earnings of said demised railroad; and said Pacific says that the said amount of eighty-nine thousand seven hundred and sixteen dollars was largely in excess of said thirty-five per cent. of said gross earnings up to this time, to wit, in the amount of ——— dollars, and that said amount so paid in excess constitutes a debt and obligation due from said St. Louis, Lawrence and Denver Railroad Company to said Pacific Railroad. And said Pacific Railroad, farther answering, says that the time has long since elapsed provided in said contract and lease when said St. Louis, Lawrence and Denver Railroad Company should, by the terms of said contract, have fenced one-third of said railroad so demised, and said company has wholly failed to comply; wherefore said company has become liable to and indebted to the Pacific Railroad in the sum of nineteen thousand dollars, or at the rate of one thousand dollars a mile for one-third of the length of said railroad; wherefore, any sums of the said large advances made to said defendant in said suit in excess of thirty-five per cent. of said gross earnings, and of said failure to construct said fence as in said contract provided, *said defendant became largely indebted to said Pacific Railroad prior to and since the service of the order of garnishment having*, to wit, in the sum of ——— dollars.

"And the Pacific Railroad, further answering, says that on the 29th day of June, 1872, it assigned said lease and contract, and all claims under the same ag'st the St. L., L. & D. R. R. to the Atlantic and Pacific Railroad Company, which last-named company has, since said time, been operating and managing said demised railroad, and has undertaken to fulfil the obligations in said regard of said Pacific Railroad, as will more fully appear from the answer herein filed of said Atlantic & Pacific Railroad."

The material parts of the answer of the Atlantic & Pacific Railroad Company are as follows:

1. "There have been no sums of money due or owing from the Atlantic & Pacific Railroad to the St. Louis, Lawrence & Denver Railroad Campany at any time since the order in the above entitled cause to the Atlantic & Pacific Railroad was served on it, or at any other time, except as hereinafter stated.

2. "The Atlantic & Pacific Railroad has not promised or contracted to pay to the St. Louis, Lawrence & Denver Railroad Company any sum or sums of money whatever, except as hereinafter stated.

3. "There have been no sum or sums of money due, and there is no sum or sums to come due, from the Atlantic & Pacific Railroad Company to the St. Louis,

Lawrence & Denver Railroad Company whatever, except as hereinafter stated.

9. "No contract has been made between said Pacific Railroad & the Atlantic and Pacific Railroad Company, except as hereinafter stated, with reference to said St. Louis, Lawrence and Denver Railroad.

10. "No contract has been entered into of any kind affecting the subject matter of said interrogatory, except as hereinafter stated.

11. "The Atlantic and Pacific Railroad Company has not used said St. Louis, Lawrence and Denver Railroad, except as hereinafter stated.

"The Pacific Railroad, on the 29th day of June, 1862, assigned and transferred the lease and contract held by it, under which it was operating said St. L., L. & D. R. R., to the Atlantic and Pacific Railroad Company, and sold and transferred to said Atlantic and Pacific Railroad Company all its right, interest, and claim in and to all debts and demands due from said St. Louis, Lawrence and Denver Railroad Company to said Pacific Railroad, and the Atlantic and Pacific Railroad, under said assignment of said lease and contract, took possession of said railroad, and has since and is now operating the same, and in consideration of said assignment of said contract, and of all of said claims and demands ag'st said St. L., L. & D. R. R. Co., said Atlantic and Pacific Railroad Company assumed and undertook to carry out all the provisions of said lease and contract binding upon said Pacific Railroad instead of or in the place of said Pacific Railroad. And said Atlantic & Pacific Railroad, further answering, says that at the time of said assignments so made to it by the Pacific Railroad, said St. Louis, Lawrence and Denver Railroad Company was largely in debt to the said Pacific Railroad, so that by virtue of said assignment said St. Louis, Lawrence and Denver Railroad Company became indebted at that time to the Atlantic & Pacific Railroad Company, and ever since that time said debt has increased, as is shown by the answer of said Pacific Railroad herewith filed, and said St Louis, Lawrence and Denver Railroad Company is still largely in debt to said Atlantic & Pacific Railroad Company, and reference is here made to the answer of the Pacific Railroad to the interrogatories herein filed, directed to it, and to the lease therein set out, which answer is herewith filed and made a part of this answer."

Hopkins filed notice that the answers of the railroad companies were not satisfactory (record, p. 20), and also moved for an order "that they and each of them be forthwith required to pay into this Court the amount of the judgment and costs in this action." (Record, p. 30). The two companies, on the other hand, moved to be discharged from the garnishment. (Record, p. 30, 31).

Then on December 2d, 1873 (in Term), the Court, over the objection of the garnishees, rendered final judgment against them as follows:

H. S. HOPKINS, *Plaintiff.*
vs.
SAINT LOUIS, LAWRENCE AND DENVER RAILROAD COMPANY, *Defendant.*
} 511.

And now comes the plaintiff herein, by Clough & Wheat, his attorneys, and also comes the defendant herein, by John P. Usher, its attorney, and also come the Pacific Railroad and the Atlantic and Pacific Railroad Company, garnishees herein, by T. A. Hurd, their attorney, and the court having duly considered the answers of said garnishees, heretofore filed herein, and the arguments of counsel thereon, on consideration thereof finds that the sum of seven thousand and five hundred dollars, part of the annual payment of $15,000, will come due to the said defendant on the first day of January next from the Pacific Railroad aforesaid, on the lease dated of the 14th day of June, A. D. 1870, mentioned in the answer herein of the Pacific Railroad aforesaid as such garnishee, and that the Atlantic and Pacific Railroad Company aforesaid has assumed the payment thereof.

It is, therefore, now by the court here considered, ordered and adjudged that said garnishees, the Pacific Railroad and the Atlantic and Pacific Railroad Company aforesaid, as garnishees herein, pay into this court, to the clerk thereof, on the first day of January next, so much of said sum of seven thousand and five hundred dollars as it will require to pay and discharge the judgment heretofore, and on the thirtieth day of November, A. D. 1872, rendered herein in favor of said plaintiff against said defendant, that is, the sum of six thousand three hundred and eighty-five dollars, with interest thereon at the rate of seven per cent. per annum from the said thirtieth day of November, A. D. 1872, and the costs by said plaintiff in this action expended, and that execution issue therefore if they neglect to make such payment on that first day of January, A. D. 1873; and that on such payment being made herein to said clerk by said garnishees, or either of them, the said garnishees are to both stand and be discharged herefrom without costs against them or either of them; but if they fail to make such payment on said first day of January next, then such execution is to be issued and enforced against said garnishees and their and each of their property at their costs. To this order and judgment said garnishees except.

ASSIGNMENT OF ERRORS.

The first error alleged in the proceedings above set forth is: The rendition of final judgment against the garnishees, on their answers, without suit, although they deny their indebtedness.

The Court could not enter up final judgment in this summary way; the extent of its power was to make an order for payment by the garnishee to the judgment creditor (which would operate as an assignment of the debt), and to empower the judgment creditor to bring suit in his own name against the garnishee, in default of payment.

This point seems too clear to admit of any serious discussion; should this Court, however, think otherwise, then it is urged that the judgment is not sustained by the answers of the garnishees, the only evidence before the Court. The Court erred in finding that the

Pacific Railroad would become indebted to the judgment debtor company, in the sum of $7500, on the 1st of January then next.

Further, the finding that the Atlantic & Pacific Railroad Company had assumed the debt of the Missouri Pacific Company, may be unobjectionable, but the Court also erred in holding that such assumption rendered the lessee and assignee jointly liable for the debt.

BRIEF.

The three points, therefore, to be considered, are:

1. Could the Court render final judgment without suit, against a garnishee who denied his indebtedness?

2. Was the lessee company then indebted to the lessor in the sum specified?

3. Is the assignee of the term responsible to the lessor for the rent jointly with the lessee?

I. Final Judgment cannot be rendered against a Garnishee without Suit.

The relevant provisions of the Kansas Code of procedure, which regulates the practice on the common law side of the Circuit Court, are as follows:

Sec. 487. (Gen. Stat. p. 725). "After the issuing or return of an execution against the property of a judgment debtor, or of any one of several judgment debtors in the same judgment, when it is made to appear by affidavit or otherwise, to the satisfaction of the judge, that there is reason to believe that any person or corporation has property of such judgment debtor, or is indebted to him, the judge may by an order require such person or corporation, or any officer or member thereof, to appear at a specified time and place within the county in which such person or corporation may be served with the order to answer, and answer the same. The judge may, also in his discretion, require notice of such proceedings to be given to any party in the action in such manner as may seem to him proper.

"489. The party or witness may be required to attend before the judge or before a referee appointed by the Court or judge. All examinations and answers before a judge or a referee, under this article, must be on oath, and reduced to writing; but when a corporation answers, the answer must be on oath of an officer thereof.

"490. The judge may order any property of the judgment debtor, not exempt by law, in the hands either of himself or any other person or corporation, or due to the judgment debtor, to be applied towards the satisfaction of the judgment, and may enforce the same by proceedings for contempt, in case of refusal or disobedience.

"491. The judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor."

These provisions are almost identical with those of the codes of New York (secs. 294, 296, 297, 298), Ohio (secs. 464, 466, 467, 468), and California (secs. 717, 719, 720). The three following sections are peculiar to the Kansas code. And the garnishee summons in this action were apparently issued in pursuance of the authority thus vested in the clerk. (Summons, record, p. 17, 20).

Sec. 502. (Gen. Stat. p. 728). "When an execution shall have been returned unsatisfied the judgment creditor may file an affidavit of himself, his agent, or attorney, in the office of the clerk, setting forth that he has good reason to, and does believe that any person or corporation to be named has property of the judgment debtor or is indebted to him; and thereupon the clerk shall issue an order, requiring such person or corporation to answer on or before a day to be named in the order, not less than ten or more than twenty days from the date of issuing the same, all interrogatories that may be propounded by the judgment creditor, concerning such indebtedness or property.

"503. The judgment creditor, or his attorney, shall prepare interrogatories concerning such indebtedness or property, a copy of which shall be served on the garnishee at the time of the service of the order, or within three days thereafter. And the garnishee shall, on or before the day required in the order, file with the clerk, full and true answers to all such interrogatories, verified by his affidavit.

"504. All subsequent proceedings against the garnishee shall be the same as in cases of attachment, as far as applicable."

The provisions of the article of the code on attachment thus referred to, are:

218. (Gen. Stat. p. 670). "If the garnishee answer, and it is discovered on his examination that at or after the service of the order of attachment and notice upon him, he was possessed of any property of the defendant or was indebted to him, the Court may order the delivery of such property, and the payment of the amount owing to the garnishee into the Court; or the Court may permit the garnishee to retain the property or the amount owing upon the execution of an undertaking to the plaintiff by one or more sufficient sureties to the effect that the amount shall be paid, or the money forthcoming, as the Court may direct.

"219. If the garnishee fail to answer, or if he answer and his disclosure is not satisfactory to the plaintiff, or if he fail to comply with the order of the Court to deliver the property and pay the money owing into the Court, or give the undertaking required in the preceding section, the plaintiff may proceed against him in an action by filing a petition against him in his own name as in other cases, and causing a summons to be issued upon it; and thereupon such proceedings may be had as in other actions and judgment may be rendered in favor of the plaintiff for the amount of property and credits of every kind of the defendant in the possession of the garnishee, and for what shall appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee. If the plaintiff proceed against the garnishee by action, for the cause that his disclosure was unsatisfactory, unless it appear in the action that such disclosure was incomplete, the plaintiff shall pay the costs of such action. The judgment in this action may be enforced as judgments in other cases. When the claims of plaintiff in attachment are satisfied the defendant in attachment may on motion be substituted for the plaintiff in attachment."

The two sections just cited are identical with sections 42 and 43 of the act as to procedure before Justices of the Peace (Gen. Stat. p. 785).

These provisions have received authoritative construction in *Board of Education* v. *Scovill*, *13 Kan.*, *17*. In this case VALENTINE J. said:

> "There are two other questions involved in this case. *First:* Is an order of a judge *pro tem.* of the district court in a proceeding in aid of execution, under § 490 of the civil code, that a garnishee shall pay over to the judgment-creditors certain money which the garnishee owes to the judgment debtor, a final determination of the liability of said garnishee to pay said money to said judgment-creditor? *Second:* Is an order of a justice of the peace in an attachment proceeding pending before him under § 42 of the justices act, that a garnishee shall pay into court certain money which the garnishee owes to the defendant in the action, a final determination of the right of the plaintiff in the action to said money? We must answer both of these questions in the negative. Neither of said orders is a judgment. The making of them is not an adjudication between the parties. It does not determine their ultimate rights. It simply gives to the creditor the same right to enforce the payment of the money from the garnishee that the debtor previously had. It is in effect only an assignment of the claim from the debtor to the creditor. The creditor gains no more or greater rights than the debtor had, and the garnishee loses no rights. And the payment of the money can be enforced from the garnishee to the creditor only by an ordinary action. It is not necessary that an order under § 490 of the civil code be made by the court, as a court. It may be made by a judge of the court, at chambers; and in the present case it was made by a judge *pro tem.* Now can it be possible that a proceeding for the recovery of money may be determined finally, without parties plaintiff or defendant, without pleadings, before a judge at chambers, and without a jury? Final jurisdiction is always conferred upon courts, and not upon judges at chambers. Besides, in proceedings for the recovery of money a man's rights can be determined against his will only

by a jury. "The right of trial by jury shall be inviolate." (Constitution, Bill of Rights, § 5). And no legislative act can abridge or impair that right. But suppose said order is an adjudication, a final determination of the rights of the parties: then there should be some way of directly enforcing it—either by execution against the property of the garnishee, or by imprisonment of his person. Now it has already been decided in this court, and well decided as we think, that an execution is not allowable in such a case. (*Arther* v. *Hale, 6 Kan., 161, 165*). And we think it is equally clear that the order cannot be enforced by imprisonment of the garnishee. (*Union Bank of Rochester* v. *Union Bank of Sandusky, 6 Ohio St., 254; Edgarton* v. *Hanna, 11 Ohio St., 323; Welsh* v. *Railroad Co., 11 Ohio St., 569*). "No person shall be imprisoned for debt except in case of fraud." (Constitution, Bill of Rights, § 16). Now suppose the garnishee owes a debt to the judgment-debtor, as is claimed in the present case. He is ordered to pay it into court, or to the judgment creditor. He is unable to do it, or indeed he may even refuse to do it. May the court, or judge at chambers, imprison him therefor? If they can, then they may not only imprison him for debt, but they may imprison him forever therefor, or at least until he pays the debt; for there is no provision for his discharge before he pays the debt. Would not this be imprisonment for debt with a vengeance? But the statute does not seem to authorize the court or judge to order the garnishee to pay the money into court, or to the judgment-creditor. It simply provides that the court or judge may order the money "to be applied toward the satisfaction of the judgment." (Civil code, § 490). Under this order the money may be paid voluntarily by the garnishee, or it may be collected from him by an ordinary action. This is the view taken of the question by the Supreme Court of Ohio. (*Edgarton* v. *Hanna, 11 Ohio St., 323*, and other cases above cited). Section 490 our code is the same as § 467 of the Ohio code, except that immediately after the words above quoted the following words are inserted in our code and omitted in the Ohio code, to-wit; "and may enforce the same by proceedings for contempt in case of refusal or disobedience." Now these words probably do not mean that the court may imprison a garnishee for not paying *money which he owes* (a debt) into court, or to the judgment-creditor; but if they do, then we think that they are unconstitutional to that extent. (*Union Bank of Rochester* v. *Union Bank of Sandusky, 6 Ohio St., 254, 260 to 262*). Section 463 of the Ohio code is the same as § 498 of our code; and both read as follows:

"If any person, party or witness disobey an order of the judge or referee, duly served, such person, party or witness may be punished by the judge as for a contempt."

"This section is about as strong as the new words inserted in § 490 of our code, and yet with this section the supreme court of Ohio made the decisions above cited.

"With regard to the order made by the justice in the attachment and garnishment proceedings, we would say that the plaintiff in such proceedings has his remedy to enforce payment of the money due from the garnishee by an ordinary action under § 43 of the justices act, and perhaps also by an action or proceeding under § 44 of the justices act; but he has no other remedy. (*Rice & Burnett* v. *Whiting, 12 Ohio St., 358*)."

A like construction has been given to the similar provisions of the New York code in *Rodman* v. *Henry, 17 N. Y., 484, Bank* v. *Pugsley, 47 N. Y., 368*, and those of the California code in *Parker* v. *Paige, 38 Cal., 522.*

In the present instance, the garnishees denied their indebtedness; that they did so argumentatively did not affect the case, nor empower the Court to decide summarily that their arguments were unsound. After filing his notice that their answers were unsatisfactory, the plaintiff's remedy was to proceed by action in his own name, under section 219 above cited.

The judgment rendered by the Court places the judgment creditor in a better position than his judgment debtor could be; the latter could not have obtained a judgment against his lessee before the rent accrued; and yet such a judgment is awarded the judgment creditor.

II. The Finding of Indebtedness was Contrary to the Evidence.

A debt *debitum in præsenti, solvendum in futuro*, may certainly be garnished (Drake on Attachment, secs. 555, 559); but a mere probability of indebtedness on settlement of accounts cannot.

The provisions of the lease are peculiar; (it is discussed in *Opdyke* v. *Pacific Railroad, 3 Dill., 55*). It may be contended that the payment of $75,000 per annum is absolute and irrespective of any set off, either because the percentage of earnings payable to the lessor is less than that sum, or for expenses incurred by the lessee for the construction of fences, prior to the time when they are to be constructed by the lessor, under clause twelve of the lease.

But there can be no doubt of the right of the lessee to deduct any amounts paid for taxes and assessments, or for the principal and interest of bonds or other debts, as such right is explicitly given by the ninth clause of the lease.

In Kansas, in 1873, taxes were payable without penalty between the 1st November, and 10th January (Gen. Stat. p. 1044, 1046), and in Missouri till the 31st December (Laws of 1873, p. 68). And during the time elapsing between the garnishment and the accruer of the rent, the lessee had the right to pay the taxes, or any other debts falling within the provisions of clause nine. Hence until the time for actual payment of the $7,500, it could not be known whether or not the lessee would be entitled to deduct sums paid for debts or taxes, or what, if any thing, would be due on settlement of account between the parties.

Again, the lessor was in default for not constructing one third of the fencing as required by the twelfth clause of the lease, and in any action for the rent the defendant could have filed a counter claim for damages for the breach of this covenant. (Kansas Code, sec. 94. G. S. p. 648. *Scantlin* v. *Allison*, *12 Kas.*, *85*. *Stevens* v. *Able*, *15 Kan.*, *584*). Of this right, of course, the judgment attacked deprives the garnishees.

Neither is rent not yet due the subject of garnishment as a debt at all: it is part of the realty, and moreover, from its nature, necessarily contingent.

In *Wood* v. *Partridge*, *11 Mass. 492*, a lessee who had covenanted to pay rent quarterly, was summoned as trustee for his lessor, or, in other words, garnished for the accruing rent.

Parker, C. J. said:

> "A covenant to pay rent quarterly creates no debt or legal demand for the rent until the time stipulated for payment. The rent may never become due. The lessee may quit the premises with the consent of the lessor; or he may assign over his term with such consent, so as to discharge himself from rent; or he may be evicted by a title paramount to that of his lessor; in either of which cases he will be discharged from the operation of his covenants. It is not the case of *debitum in præsenti, solvendum in futuro*, which is subject to attachment by the statute; but it is a contingency which cannot be attached, as was decided in the cases of *Davis* v. *Ham*" (3 Mass. 33), "and *Wentworth* v. *Whittemore*" (1 Mass., 671). "Partridge" [the lessee], "could not be lawfully adjudged the trustee of Wood for any rent which had not become due at the time the writ was served upon him; for all beyond that was contingent."

So in *Evans* v. *Hamrick*, *61 Pa. 19*, it was held that rent not yet due was not a debt, but an incident of the reversion, or part of it, and itself therefore a part of the realty, which could not be severed before due, by garnishment: but which could only be reached by taking the reversion itself in an execution against real property.

In the present case, an execution (which in Kansas would reach real as well as personal property), had already been returned unsatisfied, doubtless because the judgment's debtor's reversion was either assigned or mortgaged, and thus beyond the reach of the judgment creditor.

III. Lessee and Assignee not Jointly Liable.

The judgment is based on the finding of the Court that the Atlantic & Pacific Railroad Company assumed the debts of the Missouri Pacific Railroad Company, and as a conclusion of law, that such assumption enabled the St. Louis, Lawrence & Denver Railroad Company to sue the Atlantic & Pacific Railroad Company, although no privity of contract existed between them.

If A being in debt to B, contracts with C, that C should pay this indebtedness, can B sue C on this contract?

In New York, and the states that have followed its decisions on this point, it seems such an action would lie. See *Lawrence* v. *Fox*, *20 N. Y.*, *268; Dingledein* v. *Third Avenue R. N. Co.*, *37 N. Y.; Claflin* v. *Ostrom*, *5 N. Y.*, *581; Merrill* v. *Green*. *55 N. Y.*, *270.* Civil Code of California, sec. 1559. So in Kansas, *Anthony* v. *Hermann*, *14 Kan.*, *496*, and in Missouri, *Meyer* v. *Lowell*, *44 Mo.*, *328; Rogers* v. *Gosnell*, *51 Mo. 466. 58 Mo.*, *589.*

But this rule seems contrary to reason and to the weight of authority: to reason, because it involves the absurdity of there being two several owners of the same obligation; for either A or B can thus sue C for the same indebtedness; A because he has not paid B, and B because he has not himself been paid. In order to hold C liable to B, there should be either a novation of the contract, which would release A from liability to B, or an assignment of the contract from A to B, which would release C from all liability to A. And to authority, being in conflict with the English decisions, and repudiated by carefully considered American cases. See *Story on Contracts, sec. 480. Addison on Contracts* (Morgan's edition), *sec. 32 n. Exchange Bank* v. *Rice, 107 Mass., 39* (disapproving *Carnegie* v. *Morrison, 2 Met., 381; Brewer* v. *Dyer, 7 Cush., 337*). *Ellis* v. *Clark, 110 Mass., 389. Chitty on Contracts* (Perkins' edition), *p. 76.*

And this Court is not bound by the construction of the general commercial law adopted by the Courts of a particular state. *R. R. Co.* v. *Lockwood, 16 Wall., 368.*

Even if such an action could be maintained against the person assuming the debt, it could certainly not be joined with one against the original debtor, as the causes of action arise under distinct and independent contracts; as in this case, that against the Pacific Railroad on the original lease, that against the Atlantic & Pacific on the deed of assignment.

In *Bohanan* v. *Pope, 42 Me., 93*, while the New York rule is followed on the authority of *Carnegie* v. *Morrison*, and *Brewer* v. *Dyer*, it is said that the two remedies of the creditor in such cases—against the original debtor, and the party assuming the debt—are not concurrent, but elective, and an election of the former implies an abandonment of the latter.

If this be so, there is not merely a misjoinder of the two garnishees, but an election by the creditor on proceeding against the Missouri Pacific, to retain the remedy against the original debtor, which the Atlantic & Pacific could plead in bar of any action against it.

There is also misjoinder if it be claimed that the Atlantic & Pacific, as assignee of the lease, be liable to the lessor for the rent, by virtue of the privity of estate.

An action against the assignee of the lease for the rent accruing due during his tenure could not be joined with one against the original lessee on his covenant.

But in this particular case, any such claim against the Atlantic & Pacific Company is out of the question. The assignee could not be adjudged liable as garnishee for rent *not yet due*, because he might before it accrued, rid himself of the liability by assigning over, or might surrender, or be dispossessed of the property.

C. E. BRETHERTON,
Of Counsel for Plaintiff in Error.

J. P. Usher
Atty for plff in error

In the Supreme Court

OF THE UNITED STATES.

THE ATLANTIC AND PACIFIC RAILROAD
AND THE PACIFIC RAILROAD COMPANY.
Plaintiffs in Error,
vs.
H. S. HOPKINS,
Defendant in Error.

Brief and Argument for Defendant in Error.

CLOUGH & WHEAT,
L. B. WHEAT,
Attorneys for Defendant in Error.

KETCHESON & DURFEE, Steam Printers, Engravers and Binders, Leavenworth, Kansas.

In the Supreme Court

OF THE UNITED STATES.

THE ATLANTIC AND PACIFIC RAILROAD
AND THE PACIFIC RAILROAD COMPANY.
Plaintiffs in Error,
vs.
H. S. HOPKINS,
Defendant in Error.

Brief and Argument for Defendant in Error.

On the 30th day of November, 1872, H. S. Hopkins, in the Circuit Court for the District of Kansas, recovered judgment against the St. Louis, Lawrence and Denver Railroad Company for the sum of $6,385.00 with interest and costs of suit.

(See page 10 of the printed record.)

On said judgment so rendered as aforesaid, two executions were returned unsatisfied—pages eleven and twelve. And then there were filed such affidavits as were required by section 502 of the code of civil procedure of the State of Kansas to garnishee the Pacific Railroad Company, and the Atlantic and Pacific Railroad Company as debtors of the said judgment debtor—pages twelve and thirteen of the printed record. And then the order required by that section, was in June, 1873, served on each of said garnishees, and at the same time interrogatories as required by section 503 of said code were also served on said garnishees—pages fourteen to twenty of printed record.

These proceedings were had under the act known as the code of civil procedure of the State of Kansas and were commenced under that part thereof which is therein described as being "*proceedings in aid of* *execution*" and section 481 on page 724 and sections 502, 503 and 504 on page 728 of the General Statutes of Kansas of 1868 are in the words following to-wit:

Sec. 481. When a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any equitable interest which he may have in real estate, as mortgagor, mortagee, or otherwise, or any interest he may have in any banking, turnpike, bridge, or other joint stock company, or any interest he may have in any money, contracts, claims, or choses in action, due or to become due to him, or in any judgment or decree, or any money, goods or effects which he may have in the possession of any person, body politic or corporate, shall be subject to the payment of such judgment, by action, or as herein after prescribed.

Sec. 502. When an execution shall have been returned unsatisfied, the judgment creditor may file an affidavit of himself, his agent or attorney, in the office of the clerk, setting forth that he has good reasons to, and does, believe that any person or corporation, to be named, has property of the judgment debtor, or indebted to him; and thereupon the clerk shall issue an order, requiring such person or corporation to answer, on or before a day to be named in the order, not less than ten nor more than twenty days from the date of issuing the same, all interrogatories that may be propounded by the judgment creditor, concerning such indebtedness or property.

Sec. 503. The judgment creditor, or his attorney, shall prepare interrogatories concerning such indebtedness or property, a copy of which shall be served on the garnishee at the time of the service of the order, or within three days thereafter. And the garnishee shall on or before the day required in the order, file with the clerk full and true answers to all such interrogatories, verified by his affidavit.

Sec. 504. All subsequent proceedings against the garnishee shall be the same as in cases of attachment, as far as applicable.

By this section 504, it will be seen that *as far as applicable,* the subsequent proceedings were to be conducted under sections 206, 215, 218, 219 and 220 of said code as found on pages 667, 669, 670 and 671 of said General Statutes, which sections are in the words and figures following to-wit:

Sec. 206. An order of attachment binds the property attached from the time of service, and the garnishee shall stand liable to the plaintiff in attachment for all property, moneys and credits in his hands, or due from him to the defendant, from the time he is served with the written notice mentioned in section two hundred and one; but where property is attached in the hands of a bailee, his lien thereon shall not be affected by the attachment.

Sec. 215. The garnishee shall answer as follows: If the order of attachment be returned during a term of the court, and ten days before the close thereof, he shall answer at that term, on a day to be named in the notice, not less than ten days from the date of service. If the order be returned during vacation, he shall answer on the first day of the next term after its return. If the garnishee reside out of the county in which the action is brought, he shall file written answers to the interrogatories served upon him within the time hereinbefore provided, which answers shall be sworn to, subscribed and certified in the same manner as an affidavit. If he reside in the county in which the action is brought, he shall appear in court and be examined. A garnishee shall answer, under oath, all questions or interrogatories put to him touching the property, of every description, of the defendant, in his possession or under his control, and shall disclose truly the amount owing by him to the defendant, at or after the service of notice, whether due or not; and in case of a corporation, any stock therein held by or for the benefit of the defendant, at or after the service of notice.

Sec. 218. If the garnishee answer, and it is discovered, on his examination, that, at or after the service of the order of attachment and notice upon him, he was possessed of any property of the defendant, or was indebted to him, the court may order the delivery of such property and the payment of the amount owing by the garnishee, into the court; or the court may permit the garnishee to retain the property or the amount owing, upon the execution of an undertaking to the plaintiff, by one or more sufficient sureties, to the effect that the amount shall be paid or the property forthcoming, as the court may direct.

Sec. 219. If the garnishee fail to answer, or if he answer and his disclosure is not satisfactory to the plaintiff, or if he fail to comply with the order of the court to deliver the property and pay the money owing into court, or give the undertaking required in the preceding section, the plaintiff may proceed against him in an action, by filing a petition in his own name, as in other cases, and causing a summons to be issued upon it; and thereupon such proceedings may be had as in other actions, and judgment may be rendered in favor of the plaintiff, for the amount of property, and credits of every kind, of the defendant, in the possession of the garnishee, and for what shall appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee. If the plaintiff proceed against the garnishee by action, for the cause that his disclosure was unsatisfactory, unless it appear in the action that said disclosure was incomplete, the plaintiff shall pay the costs of such action. The judgment in this action may be enforced as judgments in other cases. When the claims of plaintiffs in attachment are satisfied, the defendant in attachment may, on motion, be substituted as the plaintiff in this judgment

Sec. 220. Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment has been determined; and if, in such action, judgment be rendered for the defendant in attachment, the garnishee shall be discharged and recover costs. If the plaintiff shall recover against the defendant in attachment, and the garnishee shall deliver up all the property, moneys and credits of the defendant in his possession, and pay all the moneys from him due, as the court may order, the garnishee shall be discharged, and the costs of the proceedings against him shall be paid out of the property and moneys so surrendered, or as the court may think right and proper; and on final judgment against the garnishee, execution may be issued as in other cases.

The answer of the Atlantic and Pacifie Railroad Company, as such garnishee, is on pages 21 and 22, and that of the Pacific Railroad is on pages 23 to 29 of said printed record.

On the hearing. the court determined that of the $15,000 payment mentioned in the contract between the Pacific Railroad and the judgment debtor set forth in the answer of the railroad company, $7,500 came due on the 1st day of January, 1874, on the lease in said answer mentioned, and the court further determined that the Atlantic and Pacific Railroad Company had assumed the payment thereof. This is shown by the answer of the last named company (see page 22 of the printed record) and then the court proceeded to subject that chose in action, the debt so coming due, to the payment of the first aforesaid judgment, as authorized by said section 481, and the sections relating to cases of attachment so far as the last named sections were applicable, and to so subject that debt to the payment of said judgment, the said Circuit Court rendered a judgment set forth on page 32 of the printed record.

As said contract was made on the 14th of June, 1870, that is, before service, and as there is no pretense that the payment coming due on the 1st of January, 1874, under the contract between the Pacific Railroad and the judgment debtor, set forth on pages 23 to 27 of the printed record, had been made, it follows that the $7,500 coming due on that 1st of January, 1874, was held by the garnishee process. (In this connection, see said section 206 and the latter part of said section 215).

If it shall be claimed that *execution* ought not to have been awarded against the garnishees, then we submit that because of said section 481, and of sections 915, 916, 917 and 918 on page 174 of the Revised Statutes of the United States, it was in the power of the Circuit Court to award such execution on rendering judgment on the aforesaid answers; there was no occasion for any further trial or proceedings; that amount — said $7,500 — was to come due to the judgment debtor on the 4th of January, 1874, and each of the garnishees was liable for the payment thereof, as shown by their own answers and under the power of the Circuit Court to regulate its own practice &c., as shown by said section 918, we submit that execution was properly awarded.

This, especially in view of the language of the latter part of the aforesaid section 481 of said code, and said code section 218.

But even if execution ought not to have been awarded, there should, we submit, be no *reversal* of the case, but only a *modification* of the order awarding execution (See 6 Kansas, 165, bottom of page.) We also claim that the returns of "no property found" on the two executions, see pages eleven and twelve of said record, make a *prima facie* case under said code Sec. 481 that the judgment debtor had not personal or real property subject to levy on execution, sufficient to satisfy the judgment on which those executions were issued.

The contract of the 14th June, 1870, between the Pacific Railroad and the judgment debtor, set forth in the answer of that Pacific R. R., on pages 23 to 27 of said record, was again before his Honor Judge Dillon for consideration in the case of Opdyke against the Pacific Railroad, reported in 3 Dillon, 55.

And on the question as to the right of the judgment debtor and Hopkins to have the benefit of the contract of the Atlantic and Pacific Railroad Co. to pay, &c., &c., as shown on page 22 of said record, see the case last cited, and

Anthony vs. Herman, 14 Kansas, 494.

Lawrason vs. Mason, 3 Cranch., 492, and same case in 2 American Leading Cases, 335, and cases there cited.

As the $7,500 was not by the order of Court required to be paid before due; and as by the contract, it was, notwithstanding anything stated in the answer of either garnishee, to come due on the first of January, 1874; and as the garnishees were by law required to disclose concerning debts *not due* as well as those *over due*—see the words: "whether due or not," in said Sec. 215, we submit that said $7,500, coming due *after* instead of *before* the time of the making of the order against the garnishees, is not a material matter.

CLOUGH & WHEAT,
L. B. WHEAT,
Attorneys for Defendant in Error.

Nov 28 1876
argued

4-14

TRANSCRIPT OF RECORD.

Supreme Court of the United States.

No. 9, Original October Term, 1876.

Ex parte—ROBERT L. CUTTING, Jr., and Others,
Petitioners,

In the Matter of

GEORGE E. KETCHUM et al.,
Complainants,

vs.

THE PACIFIC RAILROAD et al.

Petition for Rule to show Cause why Mandamus should not issue requiring the Judges of the U. S. Circuit Court for the Eastern District of Missouri, to dismiss said Cause, for want of Jurisdiction, or to allow an Appeal to Supreme Court of United States.

[illegible] Dec 2 1876
Dismissed

NEW YORK:
EVENING POST STEAM PRESSES,
208 Broadway, cor. Fulton Street.

1876.

[illegible]

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Motion for Rule to Show Cause why Mandamus should not Issue. Filed October 27th, 1876. 1

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, N. A. Cowdrey, Robert L. Cutting, Jr., and others, pray leave to file petition and transcript of record in case of George E. Ketchum and others against the Missouri Pacific Railroad Co. and others, originally instituted in the Circuit Court of the United States for the Eastern District of Missouri, and thereupon pray the court to grant a rule upon the Judges of said Circuit Court to show cause why a mandamus should not issue to grant an appeal as therein prayed.

Henry Crawford,
Solicitor.

2

(Endorsed)—Sup. Court U. S., 1876, Octr. Term, No. 9, Original—*Ex parte:* In the Matter of Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, Jacob Cromwell, George L. Kingsland, George R. Fearing and N. A. Cowdrey, Petitioners—Motion for Alternative—Writ of Mandamus—Filed 27th October, 1876.

SUPREME COURT OF THE UNITED STATES.

October Term, 1876.

George E. Ketchum and others

agst.

The Pacific Railway Company and others.

In Chancery. 3

Pending in the Circuit Court of the United States for the Eastern District of Missouri.

To the Honorable Judges of the Supreme Court of the United States:

Your petitioners, Robert L. Cutting, Jr., Peter Marie, Frank

4 A. Otis, Jacob Cromwell, George L. Kingsland, George R. Fearing and Nathaniel A. Cowdrey, respectfully show that, on the 11th day of November, A. D. 1875, one George E. Ketchum, a citizen of the State of New York, filed a certain bill of foreclosure in the said Circuit Court of the United States for the Eastern District of Missouri againsts the Pacific Railroad and others, citizens of the State of Missouri, and Henry F. Vail, James D. Fish, Edwin D. Morgan and others, citizens of the State of New York, praying for a foreclosure of said line of railroad and the sale thereof, under a certain mortgage executed to said Vail and Fish, as trustees, on July 10th, 1875, by the said Pacific Railroad Company.

That such proceedings were thereafter had in said cause, that
5 an answer was filed in the name of said railroad company by its solicitor, James Baker, admitting all the allegations of said bill, and that the said corporation was liable to pay the full principal and interest of the said $4,000,000 bonds purporting to be secured by said mortgage sought to be foreclosed,

And such further proceedings were had that, on February 7, 1876, Thomas P. Akers, by leave of court, was made defendant as a stockholder, and he thereupon filed his answer and cross-bill in behalf of himself and all other stockholders, denying the validity of said bonds and mortgage, and claiming that they were held fraudulently as against said Pacific Railroad in which he was a stockholder, and praying a cancellation thereof.

And such further proceedings were afterwards had that the
6 petitioners filed their petition making themselves parties and joining in the answer and cross-bill of said Akers, and thereafter, at an adjourned term of said Circuit Court, on the 6th day of June, 1876, a decree of foreclosure, in manner and form as shown by the record was entered in said cause, and allowed by a special judge from another district.

And thereafter, on September 6th, 1876, the said mortgaged property was offered for sale and bid off by said James Baker, the solicitor of said Pacific Railroad, and on September 19th, 1876, and on 22d, of same year, your petitioners filed objections to said decree and sale, and prayed that the said decree might be vacated and that said sale might not be confirmed.

And the court denied said motion of petitioners, and refused to grant an appeal to the Supreme Court of the United States, 7 and did and do deny that your petitioners have any standing whatever in said court in said cause, and refuse to entertain any motions or petitions made by your petitioners in said cause, whether for appeal or any other relief.

And, notwithstanding the objections of your petitioners, the said Circuit Court decreed and entered an order fully confirming said sale to said Baker, and after notice was duly served upon him and upon the said complainants that your petitioners would apply to this court to compel the allowance of an appeal, the said Baker and the complainants made application to the said Circuit Court to enter orders in said cause directing the master in chancery to execute a conveyance of all the property 8 of said corporation to said Baker, and that the receivers of said court might be directed to place said Baker in possession under the said conveyance. And your petitioners are aggrieved by the orders and decrees of said Circuit Court ordering a sale of said property, and also the one confirming the sale to James Baker, and desire to take an appeal therefrom and to each of them to the Supreme Court of the United States, but which right of appeal is wholly refused and denied them by the said Circuit Court.

Petitioners show that they are the owners, either in their own right or in trust for others, of a large amount of the capital stock of the said Pacific Railroad to the amount of over $3,000,000, at its par or face value, and that the amount in controversy in this action largely exceeds the said sum of 9 $3,000,000.

Petitioners make part of this application a transcript of the record in said cause, and specially aver that the matters and things set forth in their original petition and said petitions of September 19th and 22d are true.

In consideration whereof, petitioners pray that leave may be given to file this petition and transcript, and that a rule be granted, returnable at a short day, commanding the said judges of the Circuit Court of the United States for the Eastern District of Missouri to show cause, if any they can, why a writ of mandamus should not issue from this court commanding them, 10 or one of them, to grant your petitioners an appeal to this court from the said decrees of that court in said cause, and to accept bond to act as a supersedeas, and that such appeal be allowed as of the date when said application was made originally in said court, or when it was rejected, as this court shall order.

Or that this court will grant such other further or different relief as to equity appertains.

Oct. 27th, 1876.

ROBERT L. CUTTING, Jr.,
PETER MARIE,
GEORGE R. FEARING,
FRED. A. OTIS,
11 JACOB CROMWELL,
N. A. COWDREY.
By
H. CRAWFORD,
Solicitor.

WASHINGTON, D. C., Oct. 27th, 1876.

Personally appeared N. A. Cowdrey, and made oath that he is one of the foregoing petitioners; that the allegations therein contained are true to his best knowledge and belief.

N. A. COWDREY.

Sworn to before me, the day
and year above named.

D. W. MIDDLETON,
12 Clerk Supreme Court U. S.

HENRY CRAWFORD, Solicitor.

Endorsed: Supreme Court U. S., 1876, October Term, No. 9, original, *ex parte:* In the matter of Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, Jacob Cromwell, George L. Kingsland, George R. Fearing, and N. A. Cowdrey, petitioners.—Petition for Mandamus.—Filed 27th October, 1876.

SUPREME COURT OF THE UNITED STATES. 13

No. 9—ORIGINAL—OCTOBER TERM, 1876.

Ex parte: Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, Jacob Cromwell, George L. Kingsland, George R. Fearing, and N. A. Cowdrey, Petitioners.

IN THE MATTER OF GEORGE E. KETCHUM *et al.*,
Complainants,
vs.
THE PACIFIC RAILROAD, *et al.*
} Petition for Mandamus. 14

Now, on the 27th day of October, A. D. 1876, on the application of H. Crawford, counsel for the petitioners, for a rule on the Judges of the Circuit Court of the United States for the Eastern District of Missouri, to show cause, if any, they have, why a writ of mandamus should not issue commanding them to grant the prayer of said petitioners for an appeal in said cause: it is ordered that their petition be placed on file, together with the transcript of record accompanying the same, and a rule is directed to go, returnable on the 20th day of November, A. D. 1876, to the said Judges of the Circuit Court of 15 the United States for the Eastern District of Missouri, commanding them to show cause, if any they have, why a writ of mandamus shall not issue, as prayed in said petition.

27th October, 1876.

Attest: D. W. MIDDLETON, Clerk, Supreme Court of the United States.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } ss.:

Be it remembered, that heretofore, to wit, on the 11th day of November, A. D. 1876, in the Circuit Court of the United

16 States for the eastern district of Missouri, there appears of record the following entry, to wit:

IN EQUITY.

GEORGE E. KETCHUM,
Complainant,
vs.
PACIFIC RAILROAD ET AL.,
Defendants.
No. 703.

17

Now comes the complainant by his solicitors, Messrs. Sharp & Broadhead, and his bill of complaint herein against the said defendants; and on motion of said solicitors, it is ordered that subpœnas in chancery be issued against the said defendants, returnable to rules, the first Monday, the 3d day of January, 1876.

And the said bill of complaint, so filed as aforesaid, is in words and figures following, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES,

18 FOR THE EASTERN DISTRICT OF MISSOURI,

In Equity.

To the Honorable, the judges of the Circuit Court of the United States, for the Eastern District of Missouri, in the Eighth Circuit, sitting in equity.

Humbly complaining, shows unto your honors, your orator, George E. Ketchum, a citizen of the State of New York, who brings this bill of complaint against the Pacific Railroad, a corporation created under and by virtue of the laws of the

State of Missouri, and against the Atlantic & Pacific Railroad 19
Company, a corporation created and organized under and by virtue of an act of Congress of the United States, approved July 27, 1866, and at the several times hereinafter mentioned, engaged in operating and maintaining a railroad in the State of Missouri, aforesaid, and against James Baker, Rufus J. Lackland, and Dwight Durkee, citizens of the State of Missouri; and Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, citizens of the State of New York.

And thereupon your orator complains and alleges that the said Atlantic & Pacific Railroad Company was and is a corporation created in manner aforesaid, and by the aforesaid act of 20
Congress, authorized and empowered to sue and be sued, plead and be impleaded, defend and and be defended in all courts of law and equity within the United States.

Your orator further complains and alleges:

First.—That the said Pacific Railroad, defendant herein made and delivered to the defendants, Uriel A. Murdock, James Punnett and Luther C. Clark, a mortgage or deed of trust, dated July 15th, 1868, which said Pacific Railroad conveyed and mortgaged to said Murdock, Punnett and Clark all and singular of the entire line of the Pacific Railroad, two hundred and eighty-three miles in length, extending from the depot at Fourteenth street, in the city of St. Louis, and passing 21
through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Moniteau, Cooper, Pettis, Johnson, Cass and Jackson, in the State of Missouri, and ending at the western boundary of said State of Missouri, at Kansas City; with its appurtenances, including the depots, stations, machine-shops, rolling stock, machinery, rights, interests and franchises of the said railroad, as trustees, and in trust to secure the payment of the series of seven thousand bonds mentioned in said mortgage, severally dated the first day of August, 1868, for the sum of one thousand dollars each, payable twenty years after date to bearer in gold coin of the United States of America, at the Bank of America, in the city of New York, and interest thereon at the

22 rate of six per cent. per annum, payable semi-annually in gold coin upon the presentation of coupons thereunto annexed; and which said mortgage contained a clause to the effect that if the said Pacific Railroad should fail to pay the interest on any of said bonds secured thereby, for ninety days after the same became due and payable, and demand therefor made, or if the principal sum of any of said bonds, when and as the same became due and payable, should not be paid for the period of ninety days after demand made therefor, said mortgagees or trustees were authorized and required, upon the written request of the holder of any bond, the principal or interest of which should be in arrear or unpaid, to sell the said railroad and property, interest, rights and franchises thereby mortgaged, at 23 public auction, at the Court House in the city of St. Louis, first giving ninety days' notice thereof, and of the time, place and terms of sale, by notice specified in said mortgage; and on such sale to execute and deliver conveyances, to transfer and convey said property, and all the interest of said mortgagors therein, to the purchaser or purchasers thereof, who were thereby authorized to enter upon and take possession of the same; and in such case said trustees were directed to apply the proceeds of said sale *pro rata* among the holders of all bonds secured by said mortgage.

Your orator further shows unto your honors, that the whole amount of seven million dollars of bonds mentioned in and secured by said mortgage, were executed, issued and negotiated by said company, and are now outstanding, and that the inter-24 est has been duly and regularly paid upon said bonds, and that no interest is due thereon, nor will any mature unlil February 1st, 1876; and that said mortgage is a first lien upon the property thereby mortgaged.

Second.—Yor orator further shows unto your honors, that said Pacific Railroad made and delivered to the defendants, Edwin D. Morgan and Joseph Seligman, a mortgage or deed of trust, dated July 1st, 1871, by which said Pacific Railroad conveyed and mortgaged to the said Morgan and Seligman the same property mentioned and described in the preceding mortgage to Murdock, Punnett and Clark, and subject to the lien of said last mentioned mortgage as trustees, and in trust to secure 25 the payment of an issue of three thousand bonds mentioned in the said mortgage, severally dated July 1st, 1871, for the sum of one thousand dollars each, payable twenty years after date, in lawful money of the United States, to the holders of said bonds, at the National Bank of Commerce, in the city of New York, and interest thereon at the rate of seven per cent. per annum, payable semi-annually, in like lawful money on the presentation of coupons thereunto annexed; and which said mortgage contained a clause, similar in all respects to that mentioned in the preceding mortgage, authorizing the trustees, upon the written request of the holders of any ten or more of the bonds secured thereby, in case of default for ninety days in the payment of the principal or interest after demand, 26 or in case of failure to pay said trustees an annual sum of fifty thousand dollars, thereby agreed to be paid to reduce said mortgage, to sell and convey the premises therein mentioned, for the benefit of all the bonds secured thereby, without preference or priority.

That the whole amount of said bonds, mentioned in said mortgage, was executed, issued and negotiated by said company; and that under a clause in the said mortgage providing for a sinking fund, one hundred and ninety-six thousand of the bonds secured thereby have been redeemed and cancelled; and that the residue of the entire issue of said bonds secured by said mortgage, amounting to two million eight hundred and four thousand dollars, are now outstanding and unpaid; and that the interest has been duly and regularly paid upon all the 27 bonds outstanding, and that no interest will mature thereon until January 1st, 1876, and that said mortgage is a second lien upon the said property.

Third.—That the said Pacific Railroad made and delivered to the defendants, Rufus J. Lackland and Dwight Durkee, a mortgage or deed of trust, dated April 19th, 1872, by which said Pacific Railroad conveyed and mortgaged to the said Lackland and Durkee certain real estate in the city of St. Louis, State of Missouri, in said mortgage described as follows:

28 Four blocks of ground in the city of St. Louis, being city lots numbered four hunded and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three; bounded east by Seventh street, south by Cerré street, west by Eleventh street, and north by Poplar street; also, block number two hundred and thirteen, in the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street; saving and excepting therefrom lots 26, 29, 33 and 34, the north one-half of lot number 36, and part of lot number 25, embracing the south-west corner of said block, sixty-six feet eight inches on Fourteenth street by one hundred feet on Austin street.

29 Also, the following described real estate in the city block number four hundred and thirty-eight, viz.: Beginning at the northwest corner of Eleventh and Cerré streets, in the city of St. Louis, the southeast corner of said block; thence west along the north side of Cerré street, one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east, parallel to Cerré street, one hundred and fifty-two feet six inches, to Eleventh street; thence southwardly, on the line of Eleventh street, to the place of beginning.

Also, the following, viz.: Commencing on the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerré streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches, to an alley; thence 30 south one hundred and four feet six inches, to Cerré street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

Also, the following described tract or parcel of land, viz.: Commencing at the northwest corner of city block number four hundred and thirty-nine, the southwest corner of Twelfth and Cerré streets; thence south one hundred and twenty-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly along said south line to the northeast corner of said block 439; thence aleng the south line of Cerré street, to the place of beginning; as trustees and in trust, to secure the payment of an issue of bonds amounting in the aggregate to eight hundred thousand dollars, each dated May 1st, 1872, payable twenty years after date, in lawful money of the United States, to bearer, at the National Bank of Commerce in the city of New York, with interest thereon, at the rate of eight per cent. per annum, payable semi-annually, in like lawful money, on the presentation of certain coupons annexed to said bonds; of which said bonds, six hundred were for the sum of one thousand dollars each, and four hundred for the sum of five hundred dollars each; and which mortgage contained a clause similar to that contained in the preceding mortgage, authorizing the trustees, upon the written request of the holders of any ten or more of the bonds secured thereby, in case of default of ninety days in the payment of the principal or interest, after demand, to sell and convey the premises therein mentioned, for the benefit of all the bonds secured thereby, without preference or priority; and that the whole amount of said bonds were executed, issued and negotiated by said company, and are now outstanding, and that said mortgage is a first lien on the real estate therein mentioned. 31 32

Fourth—Your orator further shows unto your honors, that subsequent to the execution and delivery of the aforementioned mortgages, the said Pacific Railroad constructed a branch railroad connecting with and intersecting its main line at or near Kirkwood, about thirteen miles west from the city of St. Louis, and extending from the point of such intersection to the Mississippi river at Carondelet, now known as South St. Louis, in the State of Missouri, aforesaid; and also constructed, in connection with said branch railroad, side tracks running to and connecting with furnaces built on the line of the railroad at Carondelet aforesaid; and also erected on said branch road depots, engine-houses and water stations, and also a depot at Carondelet, aforesaid; and also purchased and acquired the title to various parcels of real estate on the line of said branch railroad, at or near Carondelet, aforesaid, for the erection of depots, stations, machine shops and other purposes connected with the operation of said branch railroad; and thereupon, said Pacific Railroad made and delivered to the defendants, 33

34 Jesse Seligman and James Baker, a mortgage or deed of trust,
dated Obtober 1st, 1873, by which said Pacific Railroad conveyed
and mortgaged to the said Seligman and Baker, all and
singular the branch railroad constructed and operated as aforesaid,
and extending from a point on the main line of the railroad
of the parties of the first part, at or near Kirkwood, thence
to the termination of said railroad at the Mississippi river at
Carondelet, or South St. Louis, aforesaid, with its appurtenances,
including the depots, stations, machine shops, superstructures,
and erections on the line of said branch railroad,
or at Carondelet, aforesaid; together with all the side tracks and
switches connected with said branch railroad, and also all the
lands acquired and appropriated, or which may be acquired or appropriated
35 for depots, engine houses, car houses, station houses,
warehouses, machine shops, or other superstructures and erections
on the line of said branch railroad, or at Carondelet, aforesaid,
excluding however, from the operation or lien of this mortgage,
the depot at Kirkwood, or any buildings erected, or which
may be erected at Kirkwood, aforesaid, for or connected with the
operations of the main line of said railroad, as aforesaid, as
trustees, and in trust to secure the payment of and issue of five
hundred bonds, each for the sum of one thousand dollars,
dated October 1st, 1873, payable twenty years after date, in
gold coin of the United States, at the National Bank of Commerce
in the city of New York, and interest thereon, at the
rate of six per cent. per annum, in gold coin aforesaid, semiannually,
on the first days of April and October, on the presentation
36 of coupons or interest warrants annexed thereto.

That said mortgage contained a clause to the effect that, if the said Pacific Railroad should fail to pay the interest on any of said bonds for six months after demand made therefor, or if the principal sum of any of said bonds, when the same became due and payable, should not be paid for a like period, after like demand, said trustees were authorized and required, upon the written request of the holders of bonds to the amount of one hundred thousand dollars, the principal or interest of which should be in arrear and unpaid, to sell the said property at the Court House, in St. Louis, first giving ninety day's notice thereof, as in said mortgage mentioned, and on such sale to execute and deliver conveyances thereof; to transfer and convey said 37 property to the purchaser thereof, and to apply the net proceeds to the payment of all the bonds secured by the said mortgage *pro rata*.

That each and all of said bonds mentioned in said mortgage were duly executed, issued and negotiated by the said Pacific Railroad, and are now outstanding and unpaid; and that the interest thereon has been regularly paid, and that no interest will become due thereon until April 1st, 1876, and that said mortgage is a first lien on the property therein mentioned.

Fifth—That the said Pacific Railroad made and delivered to the defendants, Henry F. Vail and James D. Fish, a mortgage or deed of trust, dated July 10th, 1875, by which said 38 Pacific Railroad conveyed and mortgaged to the said Vail and Fish all the property, real and personal, rights, interests and franchises of the said railroad, included in and covered by each of the four mortgages hereinbefore mentioned, as follows, that is to say:

1. The line of the said Pacific Railroad, extending from the depot at Seventh street, in the city of St. Louis, two hundred and eighty-three miles in length, with its appurtenances, including the real essate, depots, stations, machine shops, machinery, rights, interests and franchises of the said railroad, subject to the liens of the two mortgages hereinbefore mentioned, severally executed by said company, one of which was so executed to said Murdock, Punnett and Clark, and the other 39 of which was executed to the said Edwin D. Morgan and Joseph Seligman.

2. All and singular the following described real estate in the city of St. Louis, State of Missouri, viz.:

Four blocks of ground in the city of St. Louis, being city blocks, numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south, by Cerré street, west, by Eleventh street, and north, by Poplar street.

40 Also block number two hundred and thirteen of the city of St. Louis, bounded east by Twelfth street, south by Austin street, west, by Fourteenth street, and north by Randolph street, saving and excepting therefrom lots 26, 29, 33 and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block, sixty-six feet eight inches on Fourteenth street, by one hundred feet on Austin street. Also the following described real estate in city block number four hundred and thirty-eight, viz.: Beginning at the northwest corner of Eleventh and Cerré streets, in the city of St. Louis, the southeast corner of said block; thence west along the north side of Cerré street, one hundred and fifty-two feet and six inches, more or less to an alley; thence north 41 one hundred feet; thence east, parallel to Cerré street, one hundred and fifty-two feet and six inches to Eleventh street; thence southwardly, on the line of Eleventh street, to the place of beginning.

Also, the following, viz.: Commencing at the southwest corner of city block, number four hundred and thirty-eight, the northeast corner of Twelfth and Cerré streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerré street, thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

Also, the following described tract or parcel of land, viz.: Commencing at the northwest corner of city block number four 42 hundred and thirty-nine, the southeast corner of Twelfth and Cerré streets; thence south one hundred and seventy-six feet; more or less, to the south line of property of the Pacific Railroad; thence eastwardly, along said south line to the northeast corner of said block 439; thence along the south line of Cerré street to the place of beginning; being the same property mentioned and described in the aforesaid mortgage executed to Lackland and Durkee, and said premises being so conveyed subject to the lien of said last mentioned mortgage.

3. All and singular the branch railroad of the said Pacific Railroad, constructed and operated, and extending from a point

on the main line at or near Kirkwood; thence to the termination of the said railroad at the Mississippi river at Carondelet or South St. Louis, with its appurtenances, including the depots, stations, machine shops, superstructures, and erections on the line of said branch railroad, or at Carondelet aforesaid, together with all the side tracks and switches connected with said branch railroad, and also the lands acquired and appropriated, or that may be acquired or appropriated for depots, engine-houses, car-houses, station-houses, warehouses, machine shops, or other superstructures and erections on the line of said branch railroad or at Carondelet aforesaid; which said last mentioned premises and property were so mortgaged subject to the lien of the aforesaid mortgage to Jesse Seligman and James Baker. 43 44

That said several parcels of property, franchises and appurtenances, were so conveyed to Henry F. Vail and James D. Fish, as trustees, and in trust to secure the payment of an issue of four thousand bonds, therein and herein termed, "Third Mortgage Bonds," of one thousand dollars each, dated July 10th, 1875, payable twenty years after date, to bearer in lawful money of the United States, at the office of the Atlantic & Pacific Railroad Company, in New York, with interest at seven per cent. per annum, from May 1st, 1875, in like lawful money, semi-annually, on the first of November and May in each year, on the presentation of coupons annexed to said bonds; and that the payment of the principal and interest of each of said bonds was guaranteed by the Atlantic & Pacific Railroad Company. 45

That said mortgage contained a clause to the effect that, if the said Pacific Railroad should fail to pay the interest on any of said bonds thereby secured for six months after the same became due and payable, and demand made therefor, or if the principal sum of any of said bonds, when payable, should not be paid for six months after demand, said trustees were authorized and required, on the written request of holders of bonds to the amount of five hundred thousand dollars, the principal or interest of which should then be in arrear, or unpaid, to sell the said railroad and branch railroad, and all the property by said mortgage conveyed, at public auction, in the

46 city of St. Louis, giving notice thereof as specified in said mortgage, and to execute and deliver conveyances to transfer and convey said property to the purchaser or purchasers, who might immediately enter upon and take possession of the same, and to apply the net proceeds of said sale to the payment of all the bonds secured by said mortgage, and then unpaid, *pro rata*.

That said last mentioned mortgage, dated July 10th, 1875, recited the fact; and your orator, on information and belief, avers the fact to be, that said Pacific Railroad had issued its bonds amounting in the aggregate to fifteen hundred thousand dollars, and designated as "income bonds," each of which bonds was dated September 2d, 1872; and of which one thousand
47 were for one thousand dollars each, and eight hundred were for five hundred dollars each, and one thousand for one hundred dollars each, payable in lawful money of the United States, on the first of September, 1892, with interest at seven per cent. per annum, in like lawful currency, on the first of March and September in each year; and that said company had also made a further issue of bonds amounting in the aggregate to the principal sum of two millions dollars, and designated as "improvement bonds," consisting of two thousand bonds of one thousand dollars each, and dated December 15th, 1874, payable in lawful money of the United States, on the first of November, 1889, with interest at seven per cent. per annum, in like lawful money, payable on the first of May and November in each year, on the presentation of coupons annexed to said
48 bonds.

That the interest and principal of said "income" and "improvement" bonds were chargeable against, and payable out of the earnings of the said railroad, prior to any dividend on its capital stock, but were not secured by any mortgage or lien upon any of the property hereinbefore mentioned.

That said mortgage also recited and declared, that a portion of said third mortgage bonds should be used in retiring and cancelling the issue of income bonds and improvement bonds last above mentioned, so far as the same could be done; and that the residue of said bonds should be issued by said company for the purpose of obtaining additional sums of money for the future permanent improvement of its road.

Your orator further shows unto your honors: That the entire 49 amount of third mortgage bonds secured by said mortgage were issued by said company, and that a sufficient number of said bonds to retire the "income" and "improvement" bonds were placed in the hands of the trustees in said third mortgage mentioned, to wit, said Vail & Fish, for the purpose of being exchanged for such "income" and "improvement" bonds; and upon information and belief, your orator charges that about two millions dollars of said bonds have been exchanged for "income" and "improvement" bonds as above mentioned, and that in addition upwards of three hundred thousand dollars of said bonds have been negotiated by said company, and that all of said bonds secured by said third mortgage, are now outstanding and unpaid, and that none of the interest which 50 became due on said bonds, or any of them, on the first of November, 1875, has been paid, but that the whole amount thereof remains due and unpaid; and that your orator is the holder of many of said third mortgage bonds secured by the aforesaid third mortgage, and that the interest which became due on said bonds was duly demanded on the first day of November, 1875, according to the terms of said mortgage, and the coupons representing said interest were presented for payment at the place where the same, by the terms thereof are payable, on the first day of November, 1875, and payment demanded and refused.

Your orator further shows, that each and every of the mortgages hereinbefore mentioned was duly recorded in the proper offices, and that no proceedings at law have been had or taken 51 on behalf of any holder of any of the bonds secured by any of the aforesaid mortgages for the recovery of the principal or interest of any of the said bonds herein mentioned or secured by said mortgage, nor any suit or action commenced in regard to, or upon said mortgages, or either of them.

Sixth.—Your orator further shows unto your honors, that the Pacific Railroad, defendant herein, is a corporation created by and under the laws of Missouri, and that on the 29th of June, 1872, the said Pacific Railroad owned and operated a ailroad extending from St. Louis aforesaid to Kansas City, on

52 the western boundary line of the State of Missouri, and which said road extended through Franklin, and also operated several lines of railway connected with its main line, and which had been therefore leased to it by various railroad corporations owning such lines, and which last mentioned lines, so leased and then operated by said Pacific railroad (of Missouri), extended to and from the following points, that is to say: From Tipton to Boonville, both in Missouri, a distance of twenty-five miles; from Sedalia to Lexington, both in Missouri, a distance of fifty-five miles; from Kansas City aforesaid, to Leavenworth, Kansas, a distance of twenty-five miles: and from Leavenworth aforesaid, to Atchison, Kansas, a distance of twenty-one miles; and your orator charges that the said leased lines and the property appurtenant thereto are bound by the lien of the aforesaid
53 mortgage to James Baker and Henry F. Vail.

That on said last mentioned day the said Atlantic & Pacific Railroad Company was engaged in the operation of a continuous line of railway from Franklin in the State of Missouri, distant about thirty-seven miles west from St. Louis, to the western boundary of said State, and thence to Vinila, distant therefrom thirty-five miles; and that said corporation had no mode of reaching St. Louis aforesaid, except over the road of the Pacific Railroad, defendant herein, and that it had no passenger depots, or other adequate depots or facilities for the transaction of its business at St. Louis aforesaid.

That on the day last aforesaid, to wit, the twenty-ninth of June, 1872, the said Pacific Railroad (of Missouri), leased to
54 the said Atlantic & Pacific Railroad Company, upon the terms and conditions in said lease mentioned, the entire line of railroad then operated by it, including the several lines of railway so leased to it as last aforesaid; and thereupon the said Atlantic & Pacific Railroad Company took possession of said lines of railway so leased, and managed and operated the same; and that subsequently to said lease an additional line of road extending from Kirkwood, on the line of said Pacific Railroad, to Carondelet, on the Mississippi river, a distance of fifteen and one-half miles, being the "Carondelet Branch" hereinbefore mentioned, was built, and has been managed and operated by the said Atlantic & Pacific Railroad Company; and that addi-

tions and improvements have been from time to time made since 55 said lease by the erection of depots, freight-houses, car-houses and other structures, at and in the immediate vicinity of St. Louis aforesaid, and elsewhere, which were deemed necessary for carrying on the business of said roads, and large amounts of money expended therein and thereabout; and also in the purchase of locomotive-engines and cars, and rolling stock of various descriptions used in operating said road; and since said lease as aforesaid, the entire lines of road extending from St. Louis through Franklin, aforesaid, to the terminal points of the lines of road of said Atlantic & Pacific Railroad Company and of said Pacific Railroad respectively, as above stated, including the lines of road so leased to said Pacific Railroad (of Missouri), and said Carondelet Branch, have been operated as 56 one road; and that all the property hereinbefore mentioned is in the possession of the Atlantic & Pacific Railroad Company, and that as your orator is advised and believes, it is necessary and essential for the interests of all parties interested in said several lines of road, and of the mortgage creditors of said two companies respectively, that said road should be continued to be operated and managed as one road, proper regard being had to the rights of creditors having liens by mortgage upon portions of the railroad premises and property originally belonging to the said Pacific Railroad (of Missouri).

Seventh.—Your orator further shows unto your Honors that, by the terms of the lease to the said Atlantic & Pacific Railroad Company, the latter company agreed to, and became 57 bound to pay the interest on all the mortgages theretofore issued and executed by the said Pacific Railroad, including the mortgages herein firstly, secondly and thirdly mentioned and described, and also all moneys required to be paid by the said Pacific Railroad under the leases of the several leased lines hereinbefore mentioned, and also certain dividends upon the stock of the said Pacific Railroad, as specified in said lease; and that, by the terms of said lease, a dividend to the shareholders of the said Pacific Railroad of one and one-half per cent. upon the capital stock of the said company became payable under said lease on the 20th day of October, 1875; and that default was made in the payment thereof, and the same

58 still remains due and unpaid. That in pursuance of the said lease, obligations in various forms for the payment of money were from time to time issued by the Atlantic & Pacific Railroad Company in the name of the said Pacific Railroad, defendant herein, and for the payment of which said last named company is liable; and that said last named company is also liable to pay the principal and interest of the third mortgage bonds dated July 10, 1875, to Baker and Vail.

That the said Atlantic & Pacific Railroad Company has made default in the payment of interest upon its bonds secured by mortgages executed upon the property originally belonging to it before the making of said lease, and has become embarrassed by floating debts to a very large amount, and has been
59 unable to pay the dividends above mentioned, and the interest due November 1st, 1875, upon the third mortgage bonds herein mentioned; and that the creditors of said Pacific Railroad and of the said Atlantic & Pacific Railroad Company have threatened to sue said corporations, and each of them, and have sued said last named corporation.

That there is a large sum of money due for taxes remaining unpaid, for which each of the said railroad companies is responsible; and that the said Pacific Railroad is without sufficient means to pay and discharge its valid obligations in full as they become due; that its commercial paper has been protested; and that it is liable to actions, suits and proceedings on account thereof; and that the said Atlantic & Pacific Railroad Company is without sufficient means to pay and discharge its
60 valid obligations as they become due; that its commercial paper has been protested; and that it is liable to actions, suits and proceedings on account thereof; and that there is great danger that the property covered by the third mortgage hereinbefore mentioned may be attached or levied upon under execution or other legal process.

That the interest upon the first and second mortgages mentioned herein has been regularly paid as the same became due, and that the premises covered by said mortgages are an abundant and ample security for the payment of the bonds secured by those two mortgages as they mature; and that the net earnings and revenue of the railroad therein mentioned have been, are, and will be, ample and sufficient to provide for, 61 pay, and keep down the interest to become due under all the mortgages hereinbefore mentioned, which are prior liens to the third mortgage; but that the said mortgaged premises are an insufficient and inadequate security for the payment of the amount due and to become due under the mortgage last aforesaid, and that the rights and interests of all the parties interested in the said last-mentioned mortgage, and the rights and interests of creditors of said Pacific Railroad not secured by mortgage, require that a receiver should be appointed, as hereinafter prayed for.

Your orator further, on information and belief, alleges, that default having been made, as hereinbefore stated, by the Atlantic & Pacific Railroad Company, in the payment of interest 62 upon one of the mortgages executed and issued by that company to secure the payment of an issue of six millions dollars of bonds, an action was instituted on behalf of the holders of such bonds to foreclose such mortgage, and for the appointment of a receiver of the property and effects of the said company, including the property leased to it by the Pacific Railroad, defendant herein, and that such action is still pending and undetermined.

Eighth.—Your orator further shows unto your honors, that an application has been made by your orator, on behalf of himself and other holders of bonds, secured by said mortgage to the defendants, Henry F. Vail and James D. Fish, to take proceedings to foreclose the aforesaid mortgage, and to protect the 63 interests of your orator and such other holders; but that no such proceedings have been taken; and, as your orator is informed and believes, some doubt is expressed whether, under such mortgage, they have the right to institute such proceedings, or any proceedings thereunder, by reason of the nonpayment of the interest due November 1st, 1875, and for such reason prefer not to take such proceedings; and your orator, being apprehensive that his interests, and the interests of the other holders of like bonds, may be seriously affected by delay in the institution of proceedings to foreclose said mortgage and to obtain possession of said property, has brought this action

64 on his own behalf, and on behalf of all others similarly situated and holding like bonds secured by said third mortgage, and has made said Vail and Fish parties defendant herein.

In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable.

Your orator therefore prays that the said mortgage, dated July 10th, 1875, executed by said Pacific Railroad to the defendants, Vail and Fish, may be foreclosed, and that the premises and property covered thereby may be sold under a decree of this honorable court; that the premises and property covered thereby, which are by the terms thereof, subject to the 65 two mortgages, one dated July 15th, 1868, to the defendants, Murdock, Punnett and Clark, and the other dated July 1st, 1871, to the defendants Edwin D. Morgan and Joseph Seligman, may be sold separately, subject to the lien of said two mortgages; and that the real estate embraced in said mortgage of July 10th, 1875, which is thereby subject to the mortgage dated April 19th, 1872, to the defendants, Lackland and Durkee, may be sold separately, subject to the lien of said last mentioned mortgage; and the branch railroad and other property embraced in said mortgage of July 10th, 1875, which by the terms thereof are subject to the mortgage dated October 1st, 1873. to the defendants, Jesse Seligman and James Baker, may be sold separately, subject to the lien of said last mentioned mortgage; or, if the court should determine that all the prop- 66 erty embraced in said mortgage of July 10th, 1875, should be sold in one parcel, subject to the liens of the mortgages thereon existing, prior to said July 10th, 1875, the same may be so sold; and that if the court should determine that all the property covered by said several mortgages be sold, and the proceeds applied to the extinguishment of the several prior mortgages thereon, then, that the net proceeds of the several parcels of property covered by said several prior mortgages (the liens of which said several prior mortgages upon the several parcels of property embraced therein are hereby recognized), may be applied to the payment of said mortgages respectively, and that, subject to the payment of such prior liens, the net proceeds of

the sale of the mortgage premises under the mortgage of July 67
10th, 1875, may be applied to the payment of all bonds secured
by said mortgage last mentioned, at that time outstanding and
unpaid, and of the interest thereon, without discrimination or
preference, and rateably; and that the said several defendants in
this action, and all persons claiming under them, or either of
them, may be forever barred and foreclosed of and from all
equity of redemption and claim of, in and to said mortgaged
premises and every part and parcel thereof.

Your orator further prays that, if necessary, an account may
be taken of the bonds secured by the said mortgages, and of
the amount due on said bonds for principal and interest, or
either, and that a receiver be appointed, according to the course
and practice of this court, with the usual powers of receivers 68
in like cases, of all the property, equitable interests, things in
action, effects, moneys, receipts and earnings, rights, privileges,
franchises and immunities of the Pacific Railroad, including the
lines of railway and other property transferred to and possessed
by the said Atlantic & Pacific Railroad Company, under the
aforesaid lease from the Pacific Railroad (of Missouri), or
operated by said Atlantic & Pacific Railroad Company, as
hereinbefore stated, and all rolling stock and other property
appurtenant to said lines of railway; and that a writ of injunction
be issued out of and under the seal of this honorable court,
or by one of your honors, according to the form of the statute in
such case made and provided, enjoining and restraining the said
defendants herein, and each and every of them, except the receiver 69
appointed by this court, from interfering with, transferring,
selling or disposing of any of the property aforesaid, or
from taking possession of, levying upon, or attempting to sell,
either by judicial process or otherwise, any portion of the property
aforesaid, or of which said receiver may be appointed;
and that your orator may have such further or other relief in
the premises as to this honorable court shall seem meet.

And may it please your honors to grant unto your orator a
subpœna of the United States of America, issuing out of and
under the seal of this honorable court, directed to the defendants,
the Pacific Railroad, the Atlantic & Pacific Railroad Company,
James Baker, Rufus J. Lackland, Dwight Durkee, Jesse

70 Seligman, Henry J. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett and Luther C. Clark, respectively, therein and thereby commanding them, on a day certain therein to be named, and under a certain penalty, to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to, perform and abide by the said order, direction and decree as may be made against them in the premises, as shall seem meek and agreeable to equity and good conscience.

And as to the said several parties who are properly defendants to this bill of complaint, and who may be out of the jurisdiction of this court, your orator prays that process may be issued to make them parties if they should come within such
71 jurisdiction ; or that, if they should not come within such jurisdiction, such proceedings may be had in regard to such defendants, by publication or otherwise, to conclude them in this behalf, as may be authorized by and be according to the statutes in such case made and provided.

And your orators, as in duty bound, will ever pray, &c.

GEORGE E. KETCHUM.

SHARP & BROADHEAD,
Of Counsel for Complt.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

George E. Ketchum, being duly sworn, says: That he is the
72 plaintiff in the foregoing bill named, and has read the same, and knows the contents thereof, and that the matters and facts therein stated are true.

GEORGE E. KETCHUM.

Sworn and subscribed before me,
by the said George E. Ketchum,
on this 3d day of Nov., 1875, }

GEO. F. BETTS,
[SEAL.] U. S. Commissioner, Southern
District of New York.

And thereupon process was issued and duly served upon the defendants within the State of Missouri.

And afterwards, on the 31st day of December, 1875, the following proceedings were had in said cause, to wit: 73

GEORGE E. KETCHUM,
Complainant,
vs.
PACIFIC RAILROAD ET AL.,
Defendants.

This day come defendants, Rufus J. Lackland and Dwight Durkee, by A. M. Gardner, Esquire, their solicitor, and enter their appearance herein. 74

And afterwards, on the 8th day of January, 1876, the following proceedings were had, in said cause, to wit:

GEORGE E. KETCHUM,
Complainant,
vs.
PACIFIC RAILROAD ET AL.,
Defendants.

75

This day comes the complainant, by James O. Broadhead, Esquire, his solicitor, and shows to the court, that Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett and Luther C. Clark, are not inhabitants of, nor found within this district, and that they have not voluntarily entered their appearance herein; and on motion of said solicitor, it is ordered that said absent defendants be, and they are hereby directed to appear at the clerk's office of this court, on or before the first Monday of February next, and plead answer or demur to the complainant's bill herein.

76 It is further ordered, that a certified copy of this order be served on said absent defendants in the manner required by the rules of this court, for the service of other process.

And afterwards, to wit: on the 8th day of January, 1876, the following motion for leave to defend, was filed in said cause by Thomas P. Akers, to wit:

IN THE UNITED STATES CIRCUIT COURT,

FOR THE EASTERN DISTRICT OF MISSOURI.

77 GEORGE E. KETCHUM,
Plaintiff,
vs.
PACIFIC RAILROAD ET AL.,
Defendants.
In Equity.

Now comes Thomas P. Akers, and shows and says that he is a stockholder in the Pacific Railroad, and owns one hundred shares of the capital stock of said road; that he is informed and believes, and upon information and belief, alleges the fact 78 to be, that the above entitled cause for the foreclosure of the third mortgage bonds of the Pacific Railroad, was filed by the consent of the officers of said Pacific Railroad, that the officers and a number of the directors, being themselves interested in the third mortgage bonds of said railroad, and interested in obtaining possession of the said road under said bonds, do not intend to resist the foreclosure of said mortgage or make any resistance or defence to said suits, as will appear from the sworn statements of the attorney, director and said officer of said Pacific Railroad, filed herewith in support of this motion.

Your petitioner further shows and says, that, as a stockholder, he never gave his sanction or consent to the issuing of said third mortgage bonds, that he is informed and believes, and upon information, alleges the fact to be, that the pretended consent of some of the stockholders thereto was obtained by false and fraudulent pretences by some of the officers and directors of the said Atlantic & Pacific Railroad Company, and Pacific Railroad Company. 79

That your petitioner is informed by counsel learned in the law, that their exists a good and valid defence against this suit of foreclosure; that unless he is permitted to make answer, and defend against said bill, he will be greatly damaged in his interests as a stockholder in said road.

Wherefore, your petitioner moves and prays for leave to be granted to him by this honorable court, to come and defend in said above entitled cause.

THOMAS P. AKERS. 80

HILL & BOWMAN,
Solicitors for Petitioner.

UNITED STATES OF AMERICA, }
Eastern District of Missouri. } ss.:

Thomas P. Akers, deponent, being duly sworn on oath says: That he has read the above and foregoing bill, and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters which are stated therein on information and belief, and as to those matters this deponent believes them to be true, and deponent further says, that unless the motion as prayed be granted and leave given to defend as asked his interests will be greatly endangered.

THOS. P. AKERS. 81

Subscribed and sworn to before me, }
this 8th day of January, 1876, }
C. M. WARD,
U. S. Commissioner, Eastern District of Missouri.

And afterwards, on the 7th day of February, 1876, the following answer and cross-bill of Thomas P. Akers, was filed by leave of court.

(*Which is omitted for printed record, because the amended answer and cross-bill contains averments which is given page* 191 *to* 269).

82 And afterwards, on the 7th day of February, 1876, the Pacific Railroad filed the following answer to the bill of complainant, herein :

IN THE CIRCUIT COURT OF THE UNITED STATES,

IN THE EASTERN DISTRICT OF MISSOURI.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD, THE AT-
83 lantic & Pacific Railroad Com-
pany, James Baker, Rufus J.
Lackland, *et. al.*
} In Equity.

And now, on this day comes the Pacific Railroad, and for a separate answer to the bill of complaint in this case, says : True it is the said Pacific Railroad is a corporation, created under, and by virtue of the laws of the State of Missouri, and that the said Atlantic & Pacific Railroad Company is a corporation created under and by virtue of the act of Congress, in said bill mentioned.

This also states, that it is true that it made and delivered to
84 the defendants, Uriel A. Murdock, James Punnett, and Luther
C. Clark, the mortgage or deed of trust mentioned in said bill,
dated July 15th, 1868, to secure bonds as therein described, to
the amount of seven million dollars, and that the said mortgage
contained the provisions and conditions therein mentioned,
and the interest on the bonds herein mentioned, has been duly
paid.

This also admits that it made and delivered, as in said bill stated, to Edwin D. Morgan and Joseph Seligman, the mortgage or deed of trust therein mentioned, to secure the bonds therein mentioned, and that said mortgage contained the provisions, conditons, therein mentioned; that the whole amount were issued and sold, and that there are now outstanding the

amount thereof, in said bill mentioned, and that the interest 85
thereon has been duly paid.

This also admits that it is true that it made the mortgage therein mentioned to Rufus J. Lackland and Dwight Durkee, dated April 19th, 1872, to secure bonds, amounting in the aggregate to eight hundred thousand dollars, dated May 1st, 1872, of the description in said bill mentioned, and that said mortgage contains the provisions and conditions therein mentioned.

This also admits that it constructed the railroad therein mentioned, together with the sidetracks, depots, engine-houses, and all the other appurtenances, and purchased the real estate in said bill mentioned.

It also admits that it made and delivered to Jesse Seligman, 86
and James Baker, the mortgage, or deed of trust therein mentioned, dated October 1st, 1873, upon the property therein mentioned, to secure the bonds therein mentioned, and that said mortgage contained the provisions therein mentioned, and that said bonds are still outstanding, and the interest thereon has been duly paid.

This defendant also admits that it executed, made and delivered to the defendants, Henry F. Vail, and James D. Fish, the mortgage or deed of trust in said bill mentioned, dated July 10th, 1875, by which it mortgaged to them, for the trust therein mentioned, all the property and franchises therein described, to secure the bonds in said bill mentioned, denominated third mortgage bonds; and that said mortgage and
bonds contained the provisions and conditions, and was issued 87
for the purpose in said bill mentioned; and that a demand of the payment of the interest due thereon as alleged, was duly made, and the payment refused.

This defendant further admits, that it was the owner and lessee of the several railroads mentioned in said bill, and that at the time therein mentioned, it leased, transferred, and assigned all the railroads owned by it and leased to it, to the said Atlantic & Pacific Railroad Company in the manner mentioned in said bill, and that the said last mentioned company took possession of the said several railroads at the time mentioned in said bill, and have continued to manage and

88 operate the same since that time. They also admit, that since the date of said lease, the said Carondelet Branch Railroad has been constructed, and additional improvements, and the purchase of additional rolling stock have been from time to time made, since the date of said lease, as in said bill stated.

This defendant also states, that it is true the said Atlantic & Pacific Railroad Company, by the term of said lease agree to pay the interest on all the mortgage bonds heretofore issued, and to pay the dividends on the stock of the Pacific Railroad, as in said bill mentioned, and that default was made in the payment thereof, as therein stated.

It is also true, that in pursuance of said lease, obligations in various forms for the payment of money were from time to
89 time issued by the Atlantic & Pacific Railroad Company, in the name of the defendant, and for the payment of which, this defendant is liable, and that it is also liable to pay the principal and interest of said third mortgage bonds to Vail and Fish.

It is also true, that the said Atlantic & Pacific Railroad Company has made default in the payment of interest upon its bonds, secured by mortgages on the property originally owned by it, before the making of said lease, and has become embarrassed by floating debts, to a very large amount, and has been unable to pay the dividends aforesaid, and the interest due November 1st, 1875, on the third mortgage bonds aforesaid.

It is also true, that the interest upon the first and second mortgage bonds herein mentioned, has been regularly paid as the same became due, and that the premises conveyed by said
90 mortgage is abundant security for the first two mortgages as they mature.

This defendant, further answering, says: that the execution and delivery of the said third mortgage bonds, and the mortgage to secure the same, was done in good faith, and for legal and proper purposes, without any fraud or malfeasance on the part of the board of directors, as the stockholders of said company in the issue thereof, and constitute a legal and binding obligation on the part of this defendant to pay the same. But it says, that it is informed that a portion of said stockholders claim that they are fraudulent and void, and that the directors of this defendant are guilty of fraud in issuing the same.

Therefore, this defendant asks this honorable court to permit any of the stockholders aforesaid to become a party defendant to this suit, upon a proper showing, and make such defence in the premises as they may see proper. 91

In witness whereof, the said Pacific Railroad Company has caused these presents to be signed by James Baker, its attorney, and John L. Dearborn, its secretary, and its corporation seal to be hereunto affixed, this 7th day of February, 1876.

James Baker,
Atty. for said Company.

[SEAL.]

J. L. Dearborn, Sec.

On said 7th day of February, 1876, the following further proceedings were had in said court, to wit: 92

George E. Ketchum,
Complainant,
vs.
Pacific Railroad et al,
Defendants.

Now come defendants Henry F. Vail and James D. Fish, by Noble & Orrick, their solicitors, and enter appearance herein. Also come defendants James Baker, Jesse Seligman, Ed. Morgan, Joseph Seligman, Uriel A. Murdock and Luther C. Clark, by James Baker and Noble & Orrick, their solicitors, and enter their appearance herein, and by leave of court take until next rule day to plead herein. 93

And afterwards, on the 16th day of February, 1876, C. K. Garrison and others filed their petition to be made parties complainants, which said petition is as follows, to wit:

94 IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MISSOURI.

GEORGE E. KETCHUM,
Complainant,

vs.

THE PACIFIC RAILROAD, THE ATLANTIC & PACIFIC RAILROAD COMPANY, JAMES BAKER, RUFUS J. LACLAND, DWIGHT DURKEE,
95 Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett and Luther C. Clark,
Respondents.

To the Honorable the Judges of the Supreme Court of the United States, for the Eastern District of Missouri:

Your petitioners, Cornelius K. Garrison and James Seligman, citizens of the State of New York, and Thomas W. Pierce, a citizen of the State of Massachusetts, respectfully represent; 96 that they are the holders and owners of the third mortgage bonds referred to and described in the bill of complaint in the above entitled cause, as follows, to wit: Your petitioners, Cornelius K. Garrison holds and owns fourteen hundred (1,400) of said bonds, as will appear by affidavit herewith filed; James Seligman holds and owns three hundred and forty-seven (347), and Thomas W. Pierce holds and owns fifty (50) of said bonds, all of which said bonds are dated July 10th, 1875, and secured by a mortgage or deed of trust made to Henry F. Vail and James D. Fish, trustees, dated July 10th, 1875, and particularly described in said bill of complaint.

And your petitioners, upon information and belief state, that

the allegations of said bill of complaint, and the matters and 97
facts in said bill contained and stated, are true.

And to the end that your petitioners may be protected in their interest in the said third mortgage and in their said bonds by them held and owned, as aforesaid, and secured by said mortgage, as aforesaid, they respectfully pray that they may be made parties to the proceedings in said cause, and that they may be joined with the said George E. Ketchum as parties complainant therein, and be permitted to prosecute said suit with the said Ketchum and other owners of the said third third mortgage bonds who may desire to join as complainants herein.

And your petitioners hereby join the said Ketchum in his
prayer for the relief, by him, the said Ketchum, asked for in 98
said bill of complaint, and for such other and further orders and decrees of this court as may, in view of the allegations of said bill of complaint, may seem meet and proper.

Cline, Jamison & Day,
Attys. for C. K. Garrison,
Grover & Ellis,
Attys. for James Seligman
and Thos. W. Pierce.

And afterwards, on the 24th day of February, 1876, the following further proceedings were had in said cause, to wit:

George E. Ketchum, 99
Complainant,
vs.
Pacific Railroad et al.,
Defendants.

Now comes Thomas P. Akers, by Messrs. Hill & Bowman, his solicitors, and by leave of court files a printed copy of his answer and cross-bill herein, subject, however, to have the

100 same struck from the files on motion of adverse parties hereto, the original answer and cross-bill to remain on file.

Ordered, that this cause be set down for hearing on Monday, March 20th next.

And afterwards, on the 10th day of March, 1876, the complainant filed the following motion, to wit:

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri. }

IN THE CIRCUIT COURT OF THE UNITED STATES,

101 FOR SAID DISTRICT.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD ET AL. } In Chancery.

To the Judge of said Circuit Court:

Now, at this day comes the said George E. Ketchum, complainant in the foregoing bill, and moves the court for an order, that the answer and cross-bill of Thomas P. Akers be 102 withdrawn from the files of this court.

1. Because said answer and cross-bill were filed without leave of the court.

2. Because the said Thomas P. Akers is not a party defendant in the above entitled cause, nor authorized to appear in said cause as a party thereto.

JAS. O. BROADHEAD,
Sol. for Complainant.

And afterwards on the 25th day of March, 1876, Peter Marie and others filed the following petition to be made parties defendant herein, leave of court being given therefor. 103

IN THE CIRCUIT COURT OF THE UNITED STATES,

For the Eastern District of Missouri.

George E. Ketchum,
Complainant,

vs.

The Pacific Railroad and others,
Defendants. 104

Your petitioners, Peter Marie, Frank A. Otis, Robert L. Cutting, Jr., and James D. W. Cutting, who are citizens of the city and State of New York; George R. Fearing, of the city of Newport and State of Rhode Island, respectfully represent; that the said Peter Marie is the owner of one hundred shares of the capital stock of said railroad company; that the said Frank A. Otis is the owner of over one hundred shares of the capital stock of said company; that said George R. Fearing is the owner of over two hundred shares of said stock, and that Robert L. and James D. W. Cutting, composing the firm of 105 R. L. Cutting, Jr. & Co., are the owners of over five hundred shares of said capital stock; that Thomas P. Akers, a stockholder of said company, has filed his answer and cross-bill to the bill of complaint, filed by complainant in this case, and in said answer and cross-bill avers, that he files the same, not only for his own benefit as such stockholder, but for the benefit of all other holders or owners of the shares of said capital stock, who may come in and contribute to the cost and expense necessary to the prosecution of the same.

Your petitioners respectfully pray that they may be allowed to come in and defend the said suit and be made co-defendants herein with the said Thomas P. Akers, and be joined with him

106 as parties defendant herein, with such other stockholders as may desire to join them as such defendants.

The said petitioners further pray, that they may be allowed to adopt the said answer and cross-bill as their answer and cross-bill in this cause, and to join with him in his prayer for relief in the premises.

R. L. Cutting, Jr. & Co,
Frank A. Otis,
George R. Fearing,
Peter Marie.

And afterwards, on the 3d day of April, 1876, the following further proceedings were had in said cause, to wit:

107

George E. Ketchum,
Complainant,

vs.

Pacific Railroad et al.,
Defendants.

Now come James Seligman and Thomas W. Pierce, by Messrs. Grover & Ellis, their solicitors, on whose motion it is ordered that said Seligman and Pierce have leave to join as complainants with George E. Ketchum herein.

108 And again, on said 3d day of April, the following further proceedings were had in said cause, to wit:

APPOINTMENT OF RECEIVER. 109

GEORGE E. KETCHUM,
Plaintiff,

vs.

THE PACIFIC RAILROAD, THE ATLANTIC & PACIFIC RAILROAD COMPANY, James Baker, Rufus J.
Lackland, Dwight Durkee, Jesse
Seligman, Henry F. Vail, James
D. Fish, Edwin D. Morgan, 110
Joseph Seligman, Uriel A. Murdock and Luther C. Clark,
Defendants.

This cause having this day come on for hearing on the application and motion of the complainant for the appointment of a receiver or receivers of the property, effects, rights and franchises mentioned in said bill of complaint herein :

And the same having been duly heard by solicitors James
O. Broadhead, Esq., of counsel for complainant, and James
Baker, Esq., of counsel for the Pacific Railroad, the Atlantic & 111
Pacific Railroad Company, and for himself and A. M. Gardner, Esq., of counsel for Rufus J. Lackland and Dwight Durkee ; and Messrs. Noble & Orrick, of counsel for Henry F. Vail and James D. Fish ; Thomas J. Portis, Esq., of counsel for Jesse Seligman, E. D. Morgan and Joseph Seligman, and appearing and assenting to this order, and the court being sufficiently advised in the premises:

It is ordered, adjudged and decreed that Oliver Garrison, John H. Beach and Joseph L. Stephens, of the State of Missouri, be, and they are hereby appointed receivers in this case,

112 with full power to enter and take possession of the railroad of said "Pacific Railroad" (corporation), in the State of Missouri and elsewhere, and all its branches and leased lines, together with all side tracks, switches, station houses and all other houses, rights of way and grounds in use, or necessary or convenient to be used in operating said roads; also, all machine shops, machinery, work shops, tools and implements, belonging to said company; and all engines, cars and rolling stock of every kind owned and belonging to said company or leased by it, and all supplies, fuel, iron and material owned and belonging to said company, and all money, credits choses in action, and all other claims and demands of whatever nature to which it is entitled, and all other property, real and personal, of what-
113 ever nature and description, and wherever situated, belonging to said company, and the same to hold and use under this or such further orders as may from time to time hereafter be made by this court; and that, until otherwise ordered, the said receivers shall operate all of said roads and branches throughout the whole extent thereof according to the usual course of business thereof, and to the best advantage for the interest of all parties concerned, and generally to maintain said roads, their rolling stock, fixtures and appurtenances in good order and in an efficient and safe condition; and for that purpose to purchase, for cash or on credit, or partly for both, material and supplies whenever necessary. And as the court finds that the lease of the Pacific Railroad to the Atlantic & Pacific Railroad Company, entered into on the 29th day of
114 June, 1872, did, by the provisions of said deed of lease, and by the action of the respective companies, parties thereto, terminate on the 7th day of March, 1876; and that since that time the earnings and receipts from said respective roads properly and rightfully inured to the benefit of the company owning the same:

It is ordered, that all moneys now due for or on account of the business transacted by or over the said Pacific Railroads, and the leased lines and branches pertaining thereto, be paid to and received by the receivers herein appointed, and that they have full power to collect and receipt for the same; and that the books and accounts in the hands of the said receiv-

ers of said Atlantic & Pacific Railroad, heretofore appointed as 115
aforesaid by this court, of all the business and other transactions in respect to the operation and management of the said Pacific Railroad, its leased lines and branches, be subject at all times to the inspection and free use of the receivers hereby appointed, and their agents and servants; and that they be permitted to take copies of all or such parts thereof as they may deem proper.

And it is further ordered, that the receivers hereby appointed shall, out of the earnings of the railroads under their charge, or out of any other money that may come into their hands as such receivers, pay, at maturity, such parts of any certificates of indebtedness as may have heretofore been issued by the receivers
of said Atlantic & Pacific Railroad, under the orders of this 116
court, to pay any indebtedness on account of said Pacific Railroad, including the interest of its bonded indebtedness, or for the purchase of supplies that have been used on the same; and that they may have power to purchase and in like manner pay for any or all the supplies, material and fuel on the lines of the roads under their control heretofore purchased by said Atlantic & Pacific Railroad Company, which are liens thereon, or which have been purchased by the receivers of said Atlantic & Pacific Railroad, and justly chargeable to said Pacific Railroad and its branches and leased lines.

It is further ordered, that Henry F. Vail and James D. Fish, the trustees created by and mentioned in said third mortgage on said Pacific Railroad, be and they are hereby authorized to
exchange such of the bonds secured by said mortgage as may 117
now be in their hands for that purpose for such of the income and improvement bonds as have not yet been exchanged for as provided in said mortgage deed; and that, in case of their failure or refusal so to do, the receivers hereby appointed have full power and authority to make such exchange, reserving all rights and questions concerning the validity of said bonds and mortgage.

It is further ordered, that said receivers be and they are hereby authorized and empowered out of the property and earnings of the said Pacific Railroad, to redeem any and all other bonds or stocks belonging to the said Pacific Railroad, 118 which have heretofore been pledged or hypothecated to secure any of its indebtednes which, in their judgment and discretion, will be beneficial to the estate in their charge to pay.

And the said receivers are hereby authorized and empowered to employ and pay all such agents, servants, laborers, clerks and assistants as in their direction may be necessary under them to carry this order into effect with economy and prudence, and to make, enter into and perform all necessary contracts for the purchase of supplies; and for the prosecution of said business they are hereby further ordered and required to keep and cause to be kept in regular and systematic order, strict and regular accounts of all the business of said trust in their hands, and of the daily receipts and disbursements of 119 money, so as to keep distinct and separate the receipts and disbursements of the roads aforesaid, earned and expended by and on the Pacific Railroad, and the lines heretofore leased to that company, and so as to show the earnings and expenditures by and on account of each leased line and branch road on the part of said road lying in the State of Kansas, and elsewhere out of the State ef Missouri, and showing the mode of division of through business passing from and over two or more of said lines, and showing the items in detail.

The said receivers are hereby required to file in the office of the clerk of the court, within the first twenty days of each month, a detailed account of all their receipts and expenditures for the preceding month; and they shall also file a detailed statement of all materials purchased and the price paid or to 120 be paid for the same.

The receivers shall also pay in like manner, out of the property and earnings of each road, all sums which are now or may hereafter become due for taxes upon any of the property of such road coming to their hands as receivers; and also all interest or principal due or to become due upon any purchase of property which comes to their hands as receivers, and which, in the judgment of the said receivers, it will be beneficial to the estate in their pessession to pay.

They are hereby further authorized and empowered to appropriate and apply the property, money and effects aforesaid, vested in them as aforesaid, with the current earnings of the

said roads and business, so far as the same may be necessary 121
to the objects and purposes of this trust, under the direction of this court, for the use and benefit of such parties as may be found entitled thereto ; and if, after making all payments hereinbefore authorized, there shall remain in the hands of said receivers, at any time ; any surplus moneys, they shall report the same to this court, as to the disposition of the same.

And the said receivers are further directed to proceed with all practicable dispatch, after they enter upon the discharge of their duties, to take an inventory of all and singular the property and effects of every description of the respective roads, which may come to their possession, or under their control, in virtue of this order, noting the present condition, and to file such inventory in this court. 122

And the receivers are further empowered in their discretion to remove any of the officers or employees of said railroad company, other than the president and directors thereof, and such other officers as pertain to and and are necessary to maintain the corporate organization ; but notwithstanding this reservation, the entire management of said road, and the power to appoint and remove all superintendents, engineers, and other agents and employees, in any way concerned in operating the said road, shall belong to the receivers. The receivers, acting in pursuance of this, or any order or decree of this court herein, in good faith, shall not be individually liable for any breach of any contract entered into by them as such receivers, or for the fulfillment of any obligation entered into by them as such receivers, or for any injury to the person or property of the parties, 123
or of third persons, or for the faults or negligence of their subordinates ; but the property, moneys and effects that shall, at any time, be in their hands as such receivers, shall be bound for all such breaches or wrong, and may, from time to time, as may be necessary, be applied in such manner as this court shall direct.

It is further ordered, that each of said receivers, before entering on their duties as aforesaid, shall, within ten days from the date of this order, enter into a bond, with two or more securities, to the acceptance of this court, or one of the judges thereof, in the penal sum of five hundred thousand (500,000)

124 dollars, conditioned for the faithful performance of all duties enjoined upon them.

And it is further ordered, that each of said receivers shall without delay take an oath before a judge or the clerk of this court, faithfully to perform his duties as receiver in this cause.

It is further ordered, that the said receivers be authorized to institute and prosecute and defend any and all suits which, in their judgment, may be necessary to protect the property and interests intrusted to their charge, and to defend all suits which may be brought against them as receivers, or against the Pacific Railroad, and to execute all bonds or obligations which it may be necesssry or proper to be executed in the prosecution or defense of such suits, and to do and perform all matters and
125 things necessary in the prosecution or defense of such suits.

It is further ordered, that said receivers be authorized to pay all indebtedness of said Pacific Railroad heretofore contracted for supplies, material, and fuel used on said Pacific Railroad, its leased lines and branches, which are a lien thereon, and which they may deem just and proper; and if at any time there is not sufficient money in their hands, arising from the earnings of said railroad and other sources, that they have authority and power to borrow the same, not exceeding $300,000, and issue their certificates therefor, payable at such times as they may deem proper, not to exceed six months from the date thereof, to bear interest at a rate not exceeding eight per cent. per annum, which, if not paid out of said receipts prior to any foreclosure of the mortgage sued on in this case, shall be paid
126 out of the proceeds of the sale of the property so mortgaged when made.

It is further ordered, that the receivers hereby appointed shall pay all debts and obligations of every nature and kind heretofore contracted by the said receivers of the Atlantic & Pacific Railroad, since their appointment, for and on account of the said Pacific Railroad, and that none of the equities of any of the parties in interest shall be affected thereby, but the determination of the same is hereby reserved for the future action of this court; and that, for the purpose of enabling this court to properly settle their respective equitable rights, the matter is referred to S. D. Thompson, a master in chancery, to take an account between said Atlantic & Pacific Railroad Company and said Pacific Railroad. 127

It is further ordered, that said receivers have power and authority to pay to the county of St. Louis, and are hereby directed to pay the solicitor of said county the amount of interest now due to said county, to wit: $41,000, including March, 1876, for and on account of the interest now due on the indebtedness to said county for $700,000 of its bonds loaned by it to said railroad company. But such payment shall not in anywise be construed into a recognition or admission of any right of lien in behalf of said county on the income or property of said railroad company.

It is further ordered, that the receivers hereby appointed shall keep a record of their proceedings and of all orders made 128 by them, that in case of the absence of one of their number a majority may act, but any one who may dissent may have his objection noted on the record, and may by petition refer the matter to the court for its opinion and order thereon. Such dissent, when entered of record, shall have the effect of relieving the receiver so dissenting and his securities from all liability on account of such order or act.

It is further ordered, that the cross-bill of Thomas P. Akers heretofore filed be taken from the files of the court, as the same is found to be in defective form.

It is further ordered, that leave be given to Thomas P. Akers as a stockholder, and the county of St. Louis, claiming to be a stockholder or trustee for stockholders, to file an amended cross-bill herein within thirty days, upon giving security for 129 X costs in the sum of $5,000.

It is further ordered, that leave be granted to the county of St. Louis to make answer to the bill of foreclosure in this cause and defend against the same.

It is further ordered, that each of the receivers aforesaid be paid for his services as such receiver at the rate of five thousand dollars per year, and all necessary expenses incurred by him while away from his home in the discharge of his duties as such receiver.

It is further ordered, that the receivers give immediate attention to the settlement and payment of all just and proper taxes assessed upon the said road and its properties.

130 And afterwards, on said 3d day of April, 1876, the following further proceedings were had in said cause, to wit:

GEORGE E. KETCHUM,
Complainant,

vs.

PACIFIC RAILROAD ET AL.,
Defendants.

131 Now comes C. K. Garrison, by Messrs. Cline, Jamison, & Day, his solicitors, on whose motion leave is granted said C. K. Garrison to join with complainant in the prosecution of this cause.

Also come Henry F. Vail and James D. Fish, by Messrs. Noble & Orrick, their solicitors, on whose motion leave is granted said Vail and Fish until the first Monday in June, 1876, to plead, answer, or demur, or take further action in this case.

And afterwards, to wit: on the 25th day of April, 1876, the said Thomas P. Akers, by leave of court, files amended answer and cross-bill herein, and which is in words and figures as follows, to wit:

CIRCUIT COURT OF THE UNITED STATES, 132

Eastern District of Missouri.

George E. Ketchum
vs.
Pacific Railroad et al.
} In Equity.

adv.

Answer and Cross-Bill. 133

To the Honorable, the Judges of the Circuit Court of the United States for the Eastern District of Missouri, in the Eighth Circuit, sitting in Equity :

By leave first had and obtained, now comes Thomas P. Akers and the County of St. Louis, and presents this amended answer and cross-bill in the above entitled cause, and humbly complaining showeth unto your honors :

1st. That said County of St. Louis is a municipal corporation and political subdivision of the State of Missouri, and as such is capable of suing and being sued, pleading and being 134 impleaded.

2d. And your orators show, that said County of St. Louis under and by virtue of the provisions of an act entitled "An Act to authorize the formation of railroad associations, and to regulate the same," duly passed by the Legislature of the State of Missouri, and approved February 14, 1853, did, on the 13th day of May, 1854, subscribe to the capital stock of said Pacific Railroad $1,200,000, and thereafterwards did make full payment for the same ; that by the provisions of said act of February 14th, 1853, it was provided that upon the making of such subscription to any railroad company by any county or city, as

130 And afterwards, on said 3d day of April, 1876, the following further proceedings were had in said cause, to wit:

GEORGE E. KETCHUM,
Complainant,
vs.
PACIFIC RAILROAD ET AL.,
Defendants.

131 Now comes C. K. Garrison, by Messrs. Cline, Jamison, & Day, his solicitors, on whose motion leave is granted said C. K. Garrison to join with complainant in the prosecution of this cause.

Also come Henry F. Vail and James D. Fish, by Messrs. Noble & Orrick, their solicitors, on whose motion leave is granted said Vail and Fish until the first Monday in June, 1876, to plead, answer, or demur, or take further action in this case.

And afterwards, to wit: on the 25th day of April, 1876, the said Thomas P. Akers, by leave of court, files amended answer and cross-bill herein, and which is in words and figures as follows, to wit:

CIRCUIT COURT OF THE UNITED STATES, 132

EASTERN DISTRICT OF MISSOURI.

GEORGE E. KETCHUM *vs.* PACIFIC RAILROAD ET AL.	In Equity.

April 25. 1876.

Answer and Cross-Bill. 133

To the Honorable, the Judges of the Circuit Court of the United States for the Eastern District of Missouri, in the Eighth Circuit, sitting in Equity:

By leave first had and obtained, now comes Thomas P. Akers and the County of St. Louis, and presents this amended answer and cross-bill in the above entitled cause, and humbly complaining showeth unto your honors:

1st. That said County of St. Louis is a municipal corporation and political subdivision of the State of Missouri, and as such is capable of suing and being sued, pleading and being impleaded. 134

2d. And your orators show, that said County of St. Louis under and by virtue of the provisions of an act entitled "An Act to authorize the formation of railroad associations, and to regulate the same," duly passed by the Legislature of the State of Missouri, and approved February 14, 1853, did, on the 13th day of May, 1854, subscribe to the capital stock of said Pacific Railroad $1,200,000, and thereafterwards did make full payment for the same; that by the provisions of said act of February 14th, 1853, it was provided that upon the making of such subscription to any railroad company by any county or city, as

135 in said act provided for and contemplated, then "*such county or city shall thereupon become like other subscribers to such stock*;" that the said county of St. Louis, acting under the provisions of said act, did, on Saturday, May 13th, 1854, adopt the following order, viz.:

Ordered, That whereas, this court has been satisfied by the recent election held in St. Louis county; that it is the sense of the taxpayers thereof that this court shall subscribe to the capital stock of the Pacific Railroad (the same being that which commences in the city of St. Louis and runs westward by way of Jefferson city, and thence along the best and most practicable route through the county of Johnson, and terminating
136 at any point in Jackson county, as mentioned in the eleventh section of an act of the General Assembly of Missouri, entitled, "An Act to accept a grant of lands made to the State of Missouri by the Congress of the United States, to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Pacific Railroad," approved December 25, 1852) one million two hundred thousand dollars. This court does now hereby subscribe one million two hundred thousand dollars to the capital stock of said Pacific Railroad. And it is further ordered, that David Thomas, Esq., presiding justice of this court be, and he is hereby, appointed, authorized and instructed to subscribe the said sum of one million two hundred thousand dollars, to the capital stock aforesaid, in such manner as shall be required by the charter and by-
137 laws of said Pacific Railroad, and to execute and deliver, in that behalf, any instrument or instruments of writing that may be necessary and sufficient, as aforesaid, to show that the said subscription of one million two hundred thousand dollars to the capital stock of said Pacific Railroad has been made by this court. It is further ordered, that said said subscription, made or to be made as aforesaid, is in virtue of the powers granted in and the limitations and restrictions imposed by an act of the General Assembly of the State of Missouri, entitled "An Act to authorize the formation of railroad associations and to regulate the same," approved February 24th, 1853.

That afterwards, on June 5th, 1854, the County Court of St. Louis county entered the following order in the premises: 138

"David Thomas, Esq., the presiding justice of this court, having, under the order of this court of the 13th day of May last, subscribed on the books of the Pacific Railroad Company the sum of twelve hundred thousand dollars. The court now approve said subscription and the term thereof, and order that a copy thereof be spread upon the record of the court as follows, to wit:

STATE OF MISSOURI,
City and County of St. Louis. }

May 31, 1854. 139

In conformity with an order of the County Court of St. Louis county, made, and of record of the 13th day of May, 1854. the undersigned duly authorized under the order aforesaid, doth hereby subscribe for and in behalf of the said county of St. Louis, in virtue of the power granted and the limitation and restriction imposed by the act of the General Assembly of the State of Missouri, entitled 'An Act to authorize the formation of railroad associations and to regulate the same,' approved February 24, 1853, twelve thousand shares of one hundred dollars each to the stock of the Pacific Railroad, amounting to the sum of twelve hundred thousand dollars, and agreed to pay the same in four annual instalments; said instalments to be raised by the levy of a special 140
tax. The first instalment of three hundred thousand dollars, to be paid on or before the 15th day of December, 1854; the second instalment of three hundred thousand dollars, on or before the 15th day of December, 1855; the third instalment of three hundred thousand dollars, on or before the 15th day of December, 1856, and the fourth and last instalment of the same amount on or before the 15th day of December, 1857."

And then afterwards, on the 20th October, 1854, the following order was made by said court, viz.:

It is ordered, that for the purpose of paying the instalment of three hundred thousand dollars, due on the 15th day of De-

141 cember, 1854, of the twelve hundred thousand dollars subscribed by the court to the capital stock of the Pacific Railroad, on the 31st day of May, 1854, a special tax of seven-tenths of one per cent. be levied and collected upon all property and taxables within the city and county of St. Louis, made taxable by law for State and county purposes, for the year eighteen hundred and fifty-four:

And thereafterwards, on the 13th of November, the said court adopted, upon the application of the Pacific Railroad Company, the following order, viz.:

Upon the application of the Pacific Railroad Company, it is ordered by the court, that for the purpose of paying the
142 instalment of three hundred thousand dollars, made payable on the 15th day of December, 1855, of twelve hundred thousand dollars, subscribed by the court to the capital stock of said railroad, on the 31st day of May, 1854, and in anticipation of the collection of the railroad tax for that year, bonds of the county of St. Louis, in sums of one thousand dollars, and to the amount of two hundred and twenty-five thousand dollars, issuse to said railroad company; said bonds to be signed by the presiding justice of this court, attested by the clerk under the seal of the court; to be dated the 15th instant, and made payable on the 1st day of January, 1856, with interest at seven per cent. per annum, from the 1st day of January, 1855, for which interest, coupons signed by the clerk shall be affixed, payable one on the 1st of July, 1855, and one at ma-
143 turity of the bond. The principal and interest of said bonds to be made payable at the Phœnix Bank, New York. The said railroad company agreeing to pay all interest on said bonds, and the court reserving the right to apply a sufficiency of the tax aforesaid to be levied and collected for the year 1855, to the redemption and payment of said bonds.

And thereafterwards, on the 19th of December, 1854, it was by the County Court of St. Louis county ordered, that a warrant issued upon the treasurer in favor of the Pacific Railroad Company for one hundred and fifty thousand dollars, being on account of the $300,000 made payable on the 15th inst., according to the subscription made by the county to the capital stock of said company.

And thereafterwards, on the 8th of February, 1855, it was by the County Court of said St. Louis county ordered, that a warrant issue upon the treasurer in favor of the Pacific Railroad Company for one hundred thousand dollars, being a payment on the $300,000 due by the county on the 15th day of December, 1854, according to the terms of the subscription by the county to the capital stock of said company. 144

That afterwards, on the 8th day of March, 1855, the following proceedings were had and orders made by said County Court of St. Louis county, viz.:

Upon the application of the Pacific Railroad Company, and it appearing that there is due from the county of St. Louis to the said company the sum of fifty thousand dollars, being the 145 balance of the three hundred thousand dollars made payable on the 15th day of December last, according to the subscription made by the county to the capital stock of said company on the 31st day of May, 1854, it is ordered by the court, that fifty bonds of the county, in sums of one thousand dollars each, to be dated April 1st, 1855, payable seven months after date, with interest, at the rate of six per cent. per annum in gold or silver, at the office of the county treasurer, in the city of St. Louis, to the president of the Pacific Railroad Company or bearer, to be signed by the presiding justice of this court, countersigned by the clerk, with the seal of the court affixed, to be issued and delivered to said company in payment of said fifty thousand dollars. 146

And thereafterwards, on the 25th of April, 1855, the following proceedings were had, and orders made by said County Court of St. Louis county, viz.:

Upon the application of the Pacific Railroad Company, it is ordered by the court, that for the purpose of paying the instalment of three hundred thousand dollars, made payable on the 15th day of December, 1856, of the twelve hundred thousand dollars subscribed by the court to the capital stock of said railroad, on the 31st day of May, 1854, and in anticipation of the collection of the railroad tax for that year, bonds of the county of St. Louis, in sums of one thousand dollars, and to the amount of

141 cember, 1854, of the twelve hundred thousand dollars subscribed
by the court to the capital stock of the Pacific Railroad,
on the 31st day of May, 1854, a special tax of seven-tenths of
one per cent. be levied and collected upon all property and
taxables within the city and county of St. Louis, made taxable
by law for State and county purposes, for the year eighteen
hundred and fifty-four:

And thereafterwards, on the 13th of November, the said court adopted, upon the application of the Pacific Railroad Company, the following order, viz.:

Upon the application of the Pacific Railroad Company, it
is ordered by the court, that for the purpose of paying the
142 instalment of three hundred thousand dollars, made payable
on the 15th day of December, 1855, of twelve hundred thousand
dollars, subscribed by the court to the capital stock of
said railroad, on the 31st day of May, 1854, and in anticipation
of the collection of the railroad tax for that year, bonds of the
county of St. Louis, in sums of one thousand dollars, and
to the amount of two hundred and twenty-five thousand dollars,
issuse to said railroad company; said bonds to be signed
by the presiding justice of this court, attested by the clerk
under the seal of the court; to be dated the 15th instant, and
made payable on the 1st day of January, 1856, with interest at
seven per cent. per annum, from the 1st day of January, 1855,
for which interest, coupons signed by the clerk shall be
affixed, payable one on the 1st of July, 1855, and one at maturity
143 of the bond. The principal and interest of said bonds
to be made payable at the Phœnix Bank, New York. The said
railroad company agreeing to pay all interest on said bonds,
and the court reserving the right to apply a sufficiency of the
tax aforesaid to be levied and collected for the year 1855, to
the redemption and payment of said bonds.

And thereafterwards, on the 19th of December, 1854, it was by the County Court of St. Louis county ordered, that a warrant issued upon the treasurer in favor of the Pacific Railroad Company for one hundred and fifty thousand dollars, being on account of the $300,000 made payable on the 15th inst., according to the subscription made by the county to the capital stock of said company.

And thereafterwards, on the 8th of February, 1855, it was by the County Court of said St. Louis county ordered, that a warrant issue upon the treasurer in favor of the Pacific Railroad Company for one hundred thousand dollars, being a payment on the $300,000 due by the county on the 15th day of December, 1854, according to the terms of the subscription by the county to the capital stock of said company. 144

That afterwards, on the 8th day of March, 1855, the following proceedings were had and orders made by said County Court of St. Louis county, viz.:

Upon the application of the Pacific Railroad Company, and it appearing that there is due from the county of St. Louis to the said company the sum of fifty thousand dollars, being the 145 balance of the three hundred thousand dollars made payable on the 15th day of December last, according to the subscription made by the county to the capital stock of said company on the 31st day of May, 1854, it is ordered by the court, that fifty bonds of the county, in sums of one thousand dollars each, to be dated April 1st, 1855, payable seven months after date, with interest, at the rate of six per cent. per annum in gold or silver, at the office of the county treasurer, in the city of St. Louis, to the president of the Pacific Railroad Company or bearer, to be signed by the presiding justice of this court, countersigned by the clerk, with the seal of the court affixed, to be issued and delivered to said company in payment of said fifty thousand dollars. 146

And thereafterwards, on the 25th of April, 1855, the following proceedings were had, and orders made by said County Court of St. Louis county, viz.:

Upon the application of the Pacific Railroad Company, it is ordered by the court, that for the purpose of paying the instalment of three hundred thousand dollars, made payable on the 15th day of December, 1856, of the twelve hundred thousand dollars subscribed by the court to the capital stock of said railroad, on the 31st day of May, 1854, and in anticipation of the collection of the railroad tax for that year, bonds of the county of St. Louis, in sums of one thousand dollars, and to the amount of

147 one hundred and eighty thousand dollars, issue to said company and in order to pay the instalment of three hundred thousand dollars of the said subscription made payable on the 15th day of December, 1857, and in anticipation of the collection of the tax for that year, bonds of the county of St. Louis in sums of one thousand dollars and to the amount of one hundred and seventy thousand dollars issue to said company, said bonds to be signed by the presiding justice of this court, attested by the clerk, under the seal of the court, all to be dated May 1st, 1855, with coupons attached for the payment of the interest, at seven per cent. per annum, semi-annually. Such coupons to be signed by the clerk of this court, principal and interest of said bonds to be made payable at the Phœnix Bank
148 of New York; said one hundred and eighty thousand dollars to be made payable on the first day of January, 1857, and said one hundred and seventy thousand dollars to be made payable on the first day of January, 1858; the said railroad company agreeing to pay all interest on said bonds, and the court reseving the right to apply a sufficiency of the tax to be collected for the year 1856 and 1857, to the payment of said bonds, and all interest not punctually paid by said company, said interest to run from July 1st, 1855.

And thereafterwards, on the 28th of August, 1855, the following proceedings were had, and order made by said County Court of St. Louis county, viz.:

149 Upon the application of the Pacific Railroad Company, it is ordered by the court, that for the purpose of paying a balance of three hundred thousand dollars, made payable on the 15th day of December, 1856, of the twelve hundred thousand dollars subscribed by the court to the capital stock of said railroad on the 15th day of May, 1854, and in anticipation of the collection of the railroad tax for that year, bonds of the county of St. Louis in sums of one thousand dollars, and to the amount of one hundred and twenty thousand dollars, issue to said company, and in order to pay the balance of said instalment of three hundred thousand dollars of said subscription made payable on the 15th day of December, 1857, and in anticipation of the collection of the tax for that year, bonds of the county of

St. Louis in sums of one thousand dollars, and to the amount 150
of one hundred and thirty thousand dollars, issue to said com-
pany, said bonds to be signed by the presiding justice of this
court, attested by the clerk under the seal of the court, all to
be dated September 1st, 1855, with coupons attached for the
payment of the interest at the rate of seven per cent. per annum,
semi-annually, such coupons to be signed by the clerk of this
court, principal and interest of said bonds to be made payable
at the Phœnix Bank, New York, said one hundred and twenty
thousand dollars to be made payable on the first day of Janu-
ary, 1857, and said one hundred and thirty thousand dollars to
be made payable on the first day of January, 1858 ; the said
railroad company agreeing to pay all interest accruing on said
bonds ; and the court reserving the right to apply the railroad 151
tax collected for said years to the payment of said bonds. Said
interest to run from October 1st, 1855, and the first coupon on
each bond to run three months.

That thereafterwards, on the 7th day of January, 1856, the
County Court of St. Louis county, made its order directing a
warrant to issue upon the treasurer of said county, to the
Pacific Railway Company, for seventy-five thousand dollars,
being the balance due said company on the instalment due on
the 15th day of December last, according to the terms of the
subscription made by the county to the capital stock of said
company. That each and all of the foregoing orders so made
as aforesaid were duly executed, and full payment made as
aforesaid for said $1,200,000 stock of the Pacific Railroad, so
subscribed for as aforesaid by the county of St. Louis. That 152
pursuant to the provisions of said act of February 14th, 1853,
the county of St. Louis levied a special tax for the larger por-
tion of the stock subscription so made, and special tax receipts
were issued to such of the taxpayers of the county St. Louis
as paid such tax. That by virtue of the provisions of said act,
the holders of said tax receipts became entitled to receive from
the county of St. Louis an amount of stock of said Pacific
Railroad, equal in amount to the tax receipts so held by such
taxpayers. That there has been delivered to the taxpayers of
St. Louis county, under the provisions of said act, $982,000 of
said stock. That there remains $218,000 of said original

153 stock, the rightful property of the county of St. Louis, to be held in trust and faithfully cared for by the said county, until the same shall be demanded by any taxpayers entitled thereto.

That among the privileges, as originally given to said county, was the privilege of voting all stocks so subscribed and paid for until the same should be issued to such taxpayers as were entitled thereto. But in violation of the said contract, the Legislature of the State of Missouri, on the 14th of March, 1869, enacted the following provision:

"The board of county commissioners (since changed to the County Court for St. Louis county) shall meet on the days respectively fixed for the election of directors of the Pacific, Iron Mountain and North Missouri Railroads, and cast the 154 vote of the county for suitable persons as directors of said several companies; but in counting said vote, the said board shall not take into account, and shall not assume to represent the shares of stock of the Pacific Railroad, which the County Court of St. Louis county, in behalf of said county aforesaid, in the year 1854, for which the taxpayers of St. Louis county have paid by a direct tax, and for which such taxpayers are entitled to certificates on presentment of their railroad tax receipts. Nor shall said board of county commissioners assume to represent the stock to be paid by a special tax subscribed to the Iron Mountain and North Missouri Railroad Companies, after said subscription has been paid by a levy of the special tax, and the taxpayers are entitled to 155 certificates."

And your orators aver, that by means of the above illegal act (the same being in violation of contract previously entered into by the county of St. Louis and Pacific Railroad Company), the county of St. Louis has been prevented from voting or representing, as by its contract it was entitled to do, and has never by its vote sanctioned any of the illegal or fraudulent acts, hereinafter stated and complained of, and has never received any of the dividends under the said pretended lease of June 29th, 1872, herein after referred to.

3d. And at all times saving and reserving unto themselves all benefits and advantage of exception, which can or may be had or taken for answer thereto, or unto so much or such parts 156 thereof as they are advised are material or necessary for them to make answer unto, answering saith: That they admit the allegation of complainant's said bill as to the first mortgage of $7,000,000, secured by deed of trust, dated July 15th, 1868, as also the allegations of complainant's said bill as to the second mortgage of $3,000,000, secured by deed of trust, dated July 1st, 1871. These defendants further say that as to the real estate mortgage of $800,000, secured, as is alleged in said bill of complaint, by deed of trust dated April 19th, 1872, they have no knowledge or information sufficient to enable them to form a belief, and are not sufficiently advised to either deny or admit, but asks that the court will require from complainant 157 strict proof of the allegations in complainant's bill concerning the same. And as to the said mortgage of $500,000 upon the Carondelet Branch, so called, secured, as is alleged by complainant, by mortgage or deed of trust, dated October 1st, 1873, they have no knowledge or information sufficient to enable them to form a belief, and are not sufficiently advised to either deny or admit, but asks that the court will require from complainant strict proof of the allegations of complainant's bill concerning the same.

That as to the said alleged mortgage to Henry F. Vail and James D. Fish, dated July 10th, 1875, by which it was attempted to convey all the property real and personal, rights, interests and franchises of the said Pacific Railroad, described 158 in each of the four mortgages before mentioned, for the securing of $4,000,000 so-called third mortgage bonds, defendants say, that they as stockholders never consented thereto, and are informed and believe and have reason to believe, and upon information and belief charges the fact to be, that said alleged mortgage was fraudulently executed, and a pretended consent of a portion of the stockholders, the execution of the same was obtained through false and fraudulent pretences and representations in this, to wit: That it was, as they are informed and believe, falsely stated and represented to the directors and stockholders of the said Pacific Railroad by the directors of the Atlantic & Pacific Railroad Company, then in charge, as lessees, of the Pacific Railroad, that a large amount of per-

159 manent improvements had been made on said Pacific Railroad —large and permanent improvents as to road-beds and bridges by said lessees, and by reason of which the Pacific Railroad had become largely indebted therefor, and that such false representations were so made by verbal statements of the directors and officers of said Atlantic & Pacific Railroad Company, and also by means of printed circulars, caused to be issued by said directors and officers, and circulated among said stockholders; that said representations so made were, as he is informed and believes, false and fraudulent in this, to wit: That no improvements had been made on said road by the Atlantic & Pacific Railroad Company of any kind, except such as were required by the terms and provisions of said lease of June 160 29th, 1872, to be made at the cost and expense of the said last mentioned company, lessees; in that no improvements had been made except such as were necessary to keep said road in as good condition as when received; and the false representations so made as aforesaid were made for the purpose of securing the assent of the directors and stockholder of the Pacific Railroad to said mortgage. That said mortgage was made, and so fraudulently executed in fraud of the rights of the *bona fide* unsecured creditors and all stockholders of said Pacific Railroad; that the directors of said Atlantic & Pacific Railroad Company for the purpose of obtaining by foreclosure of said mortgage a title to said road, caused said false and fraudulent representations to be so made. That the complainant in said bill as defendant is informed and believes, and has reason to 161 believe, and upon information and belief alleges the fact to be, received all bonds now held by him with full information of the fraudulent issue of the same, and of the facts as hereinbefore stated, and hereinafter set forth, and that said $4,000,000 bonds have been distributed, and at the time of the institution of this suit were held by said complainant Ketchum, and the directors of said Atlantic & Pacific Railroad Company for said company and for themselves and by their associates, with full knowledge of the facts above stated, and hereinafter recited.

And that the said C. K. Garrison, who has joined in the prosecution of said suit of foreclosure since the institution of the same, and who by himself and associates now holds, owns and controls the greater portion of said third mortgage bonds, 162 purchased the same at a nominal price, to wit: From twenty-eight to fifty cents on the dollar, purchased and now holds same, with full knowledge of the facts hereinbefore and hereafter stated, and all parties now holding any of said third mortgage bonds, and who are seeking with complainant a foreclosure of same, hold the same with like knowledge and information, and have obtained the same speculatively for the purpose and intent of procuring possession of the Pacific Railroad freed from the rights of your orators and the stockholders and unsecured creditors. That prior to the time when said third mortgage was so executed, to wit: On the 29th June, 1872, the said Pacific Railroad executed a pretended lease to the said Atlantic & Pacific Railroad Company, upon 163 certain terms and conditions in said lease mentioned, of the entire line of railroad then owned and operated by it, as will more fully appear by copy of said pretended lease filed herewith for the information of this honorable court, and made part of this answer. That under said pretended lease the said Atlantic & Pacific Railroad Company on said 29th day of June, 1872, obtained possession of said Pacific Railroad and its appurtenances, and continued in full possession of same until about November 4th, 1875, and until receivers thereof were appointed by this honorable court. That under the terms of said lease, if the same were of binding force and effect, the Atlantic & Pacific Railroad Company agreed and covenanted to pay all debts contracted for the keeping of said Pacific Railroad in good and sufficient repair as a first-class railroad; 164 that all of said indebtedness of said Pacific Railroad as the same existed on July 10th, 1875, in excess of the indebtedness existing June 29th, 1872, was in fact the indebtedness of said Atlantic & Pacific Railroad Company, not only by reason of said lease, if valid, but by reason of the same having been contracted by said last mentioned company while in possession of said road under said pretended lease, and receiving its income which was more than sufficient to pay all running expenses of the same, all interest on its mortgage debt, all taxes and all indebtedness for improvements thereon contracted for by said Atlantic & Pacific Railroad Company. That by

165 reason of the foregoing facts, the said mortgage or deed of trust of July 10th, 1875, was null and void, and of no force and effect, and so known to be by said complainant and the parties receiving and now holding said third mortgage bonds; that said parties paid but a nominal price for said bonds, knowing at the time of receiving same that they had been fraudulently issued in manner as aforesaid.

Defendants further answering state, that the premises known as the Pacific Railroad are now earning, and for the last six years have earned annually, from $3,200,000 per annum to $3,700,000, which, after paying the taxes and operating expenses, have been amply sufficient to pay all interest upon all legitimate debts of the railroad company and a fair dividend
166 to the stockholders. That the net earnings of said Pacific Railroad company, according to the printed reports made by the defendants, the Atlantic & Pacific Railroad Company, and by Andrew Pierce and the other defendants, directors in said Atlantic & Pacific Railroad Company, are about thirty-eight per cent. of the gross earnings, or say from $1,216,000 to $1,406,000 per annum.

That the amount received by said Atlantic & Pacific Railroad Company, from and on account of the Pacific Railroad from July 1st, 1872, to September 30, 1875, exceeded in amount $15,291,648. That at the time when said Atlantic & Pacific Railroad took possession of the Pacific Railroad, on June 29th, 1872, there was cash and other available assets on hand, mainly in bills receivable, nearly or quite sufficient to pay all
167 the floating indebtedness of said Pacific Railroad. That if there was any deficiency it did not exceed more than about $250,000. That the bonded indebtedness of said road then existing amounted to only about $10,800,000, bearing interest at an average rate of less than seven per cent., excepting the debt due on account of $700,000 bonds of the county of St. Louis, which the road was bound and obliged to pay, together with interest at the rate of seven per cent. per annum.

That by the terms of said lease, the said defendant, the Atlantic & Pacific Railroad Company, had no authority or right to encumber the the leased property, except for the purpose of paying the debts of said Pacific Railroad Company.

That the earnings and income of the Pacific Railroad Company, while in the possession of said Atlantic & Pacific Railroad Company, have been quite sufficient, and the petitioner avers, if properly administered, more than enough to pay the just and proper operating expenses, all accruing interest on the bonded debt due from said Pacific Railroal Company. 168

Defendants aver, upon information and belief, for that they have good reason to believe and so believe, thatt he proceeds of the $800,000 real estate bonds, issued as above described, on the 19th of July, 1872, and the $500,000 Carondelet Branch bonds, issued as above described, October 1st, 1873, were sufficient ample with which to pay for all permanent improvements made by said Atlantic & Pacific Railroad Company upon the premises claimed. 169

Defendants therefore aver, upon information and belief, and charges the facts to be. that the issue of said $1,500,000 income bonds, September 1st, 1872, and the issue of said $2,000,000 of improvement bonds, December 15th, 1874, by the defendants, were fraudulent and unauthorized, and not required by any legitimate and proper wants of the said Pacific Railroad Company, and the said issues of bonds were not for the use and benefit of said Pacific Railroad; that whatever benefit was derived from said issues of bonds, inured to the said Atlantic & Pacific Railroad Company.

And defendants aver, upon information and belief, and charges the facts so to be, that said income and said improvement bonds were wrongfully issued by and at the request of said Atlantic & Pacific Railroad Company and its directors, 170
and the defendants above named, directors of said Pacific Railroad, in collusion with others to your petitioner unknown, for the purpose and with the intent of encumbering, conveying and misappropriating the property of said Pacific Railroad Company, to the great injury of your petitioner and other stockholders of said company.

And complainant further says, that he is informed and believes, and upon information and belief alleges the fact to be, that the earnings of said Pacific Railroad since June 29, 1872, have been sufficient in amount to pay all operating expenses

171 and interest on its bonded debt then existing, and to pay in full its floating debt.

Your orator further states, that the construction of said Carondelet Branch, as he is informed and believes and charges, cost but $382,457.36; that on the 15th of October, 1873, a mortgage of $500,000 was issued, as aforesaid, and secured on said branch; that in addition thereto there was a real estate mortgage issued, as aforesaid, on the 19th of July, 1872, securing $800,000 real estate bonds, and that it is, as your orator is informed and believes, claimed by the directors of the Atlantic & Pacific Railroad Company that the proceeds of a large portion of same were also used in the construction of said Carondelet Branch; but your orator says that he is informed and
172 believes and has reason to believe, and upon information and belief alleges the fact to be, that no proper accounting has ever been made as to how said $800,000 of "real estate bonds" were used, or for what purpose the proceeds thereof were applied. And your orator further shows, that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that the said $1,500,000 "income bonds," issued, as aforesaid, on the 1st of September, 1872, as also the $2,000,000 improvement bonds, issued as aforesaid on the 15th of December, 1874, were issued and caused to be issued and delivered by the board of directors of the Atlantic & Pacific Railroad Company, not for the purpose or use of the Pacific Railroad, or for the payment of its debts, or of any debts contracted on its behalf or for its benefit—as the income
173 of the said road was amply sufficient therefor—but that the same were fraudulently issued and hypothecated for the purpose of paying and securing the debts of the said Atlantic & Pacific Railroad Company and the individual debts of the board of directors of said cnmpany, to wit: Andrew Pierce, William H. Coffin, and others of the board of directors of said company, and that no part of said bonds were used for the benefit of said Pacific Railroad or for the payment of its debts, but the same were issued and used in manner as aforesaid in fraud of the rights of your orator and all other stockholders of the Pacific Railroad. That the said "income bonds" so issued on September 1st, 1872, were chargeable against the income of

said road, and bear interest at seven per cent. per annum, and 174
are numbered from one to one thousand, both inclusive, of the denomination of $1,000 each, and eight hundred of said bonds numbered from 1001 to 1800, both inclusive, being of a denomination of $500 each; and one thousand of said bonds numbered from 1801 to 2800, both inclusive, are of the denomination of $100 each. That said improvement bonds so issued as aforesaid, on December 15, 1874, and due November 1, 1889, bear interest at seven per cent. annum, payable semi-annually, and are all of the denomination of $1,000 each, and guaranteed by the Atlantic & Pacific Railroad Company.

And your orator further shows and says, that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that said Andrew Pierce, Clin- 175
ton B. Fisk, and others of the directors of the Atlantic & Pacific Railroad Company, constituting a majority of said board of directors, fraudulently combined and confederated together, aided by a majority of the members of the Pacific Railroad Company, for the purpose of encumbering and misappropriating the property of the said Pacific Railroad, and obtaining possession thereof freed from any claim of title thereto, or interest therein of the stockholders of said road, and of the unsecured creditors thereof. That in furtherance of said fraudulent purpose a majority of the directors of said Atlantic & Pacific Railroad Company conspired with James H. Baker, Daniel R. Garrison and James J. Taussig and others, constituting a majority of the directors of said Pacific Railroad, and that in pursuance
of such fraudulent purpose, and for the carrying out the ob- 176
ject and purpose of said conspiracy, the said income and improvement bonds were issued in fraud of the rights of your orator and all other *bona fide* stockholders in said Pacific Railroad. That said "Income" and "Improvement Bonds" were fraudulently distributed among the directors of said Atlantic & Pacific Railroad Company and said Pacific Railroad and their associates, who received the same at nominal prices, and all parties now holding any portion of the same received said bonds with full notice of the facts above recited and hereinafter stated, as also of the fact that there was no authority given under said pretended lease for issuing said bonds, a copy

177 of which is recorded in each county through which the said Pacific Railroad runs.

That the holders of said bonds, issued under, and purporting to be secured by said mortgage, to said Vail and Fish, trustees, dated July 10th, 1875, took them with full knowledge of all the matter and things alleged in this petition, and have bought and received them as a tainted, doubtful and illegal security, at a low price, in some instances merely nominal. The petitioner avers this to be specially true of C. K. Garrison, one of the defendants herein named, who, after attending a meeting of the stockholders of the Pacific Railroad Company, held in the city of New York, on the 28th and 29th of December, 1875, at which meetings the frauds of some of the other defendants

178 herein, and the want of equity attainting said third mortgage bonds, were discussed and expressed, went from said meeting and thereafter purchased from various creditors of the Atlantic & Pacific Railroad Company said third mortgage bonds to a very large nominal amount, the petitioner avers upon information and belief, to the par amount of $1,500,000, at the nominal rate of 50 per cent., or thereabouts.

That a pretended consent of stockholders of said Pacific Railroad to the issuing of said third mortgage bonds was obtained, as defendants are informed and believe, and has reason to believe, and upon information and belief alleges the fact to be by false statements and fraudulent representations made by the board of directors of the Atlantic & Pacific Railroad Company, for whose benefit mainly the said pretended third mort-

179 gage was made and executed; that said false and fraudulent statements and representations were made by means of circulars distributed among the stockholders of said Pacific Railroad, by the instigation and procurement of the directors of the Atlantic & Pacific Railroad Company. That by said false and fraudulent circulars, and the false statements therein contained, the stockholders of said Pacific Railroad were led and induced to believe that such permanent improvements and extensions had been made to said Pacific Railroad, and that such *bona fide* indebtedness had been contracted therefor, as to make necessary and expedient the issuing of said four millions of bonds, and the execution of said third mortgage for the

securing thereof. All which representations so made were, as 180
your orator is informed and believes, false and fraudulent; and had not such false representations been so made as aforesaid by the directors of said Atlantic & Pacific Railroad Company, such pretended consent could not have been obtained from the then stockholders of the Pacific Railroad, for your orator is informed and believes, and has reason to believe, and upon information and belief, charges the fact to be, that the directors of said Atlantic & Pacific Railroad Company caused to be printed and issued among the stockholders of said Pacific Railroad fraudulent circulars, with blank power of attorney attached thereto, for the purpose of obtaining authority and ratification by the stockholders by the issuing of said third mortgage.

181 That in said circular, false and fraudulent statement of facts were made as to pretended permanent improvements of said Pacific Railroad, as to the building of new bridges by the lessee, which in fact had not been built, and as to the existence of a large pretended floating indebtedness of the Pacific Railroad, which did not in fact exist.

That by means of these and other false statements in said circulars contained so fraudulently made as aforesaid, the signatures of a large number of stockholders were obtained to the proxies or powers of attorney attached to said circulars. That such proxy and power of attorney was so attached to said fraudulent circulars that the same could be detached, and removed therefrom without defacement; that such separation
182 was made, and fraudulently caused to be made, by the directors of said Atlantic & Pacific Railroad Company, who thereby attempted to secure by the fraudulent means, in manner as aforesaid, the proxies and powers of attorney of the stockholders of said Pacific Railroad, for the ratification of said third mortgage. That, in fact, the pretended ratification of the stockholders was not otherwise secured, than through and by means of such pretended proxies and powers of attorney thus obtained as aforesaid; that the powers of attorney and proxies so obtained, only authorized the issuing of bonds to pay *bona fide* indebtedness of said Pacific Railroad.

That the representations contained in said circular are false

183 and fraudulent, in this, that it implies that floating liabilities had been created on account of the Pacific Railroad Company by the Atlantic & Pacific Railroad Company, in permanently improving the Pacific Railroad in a manner and form, and to an extent not required to be done at the proper charge and expense of the Atlantic & Pacific Railroad Company, by said pretended lease, under which the Atlantic & Pacific Railroad Company were in possession of the premises known as the Pacific Railroad. Your petitioner avers, upon information and belief, and so charges the fact to be, that no such liabilities rightfully existed as against the Pacific Railroad.

That said circular, so issued as aforesaid, was issued as aforesaid by the president of the Pacific Railroad, at the instigation
184 and procurement of the directors of the Atlantic & Pacific Railroad, pursuant to the conspiracy so entered into as aforesaid. That at the time of issuing the same, the said president of the Pacific Railroad Company was really acting for and in the pay of the Atlantic & Pacific Railroad Company, and was auditor of said last named company. That these defendants had no knowledge of issuing said circular at the time, and had no knowledge of the execution of said third mortgage until a few days prior to the institution of this suit. A copy of said circular is, for the information of this honorable court, attached hereto, and marked "Exhibit B."

Defendants further answering show, that the stockholders of the Pacific Railroad would, as they are informed and believe,
185 and upon information and belief, allege the fact to be, never would have consented to or sanctioned said third mortgage and the issuing of said third mortgage bonds had the facts been truthfully stated and made known to them, and that only through fraud and misrepresentation as to the necessity for same was such pretended consent obtained. The defendant admits, that the said third mortgage bonds so issued in July, 1875, were antedated as of May 1st, 1875, and the interest made payable thereon on the first of November and May in each year; and the defendants say, that they are informed and believe, and have reason to believe, and upon information and belief alleges the fact to be, that the said bonds were so antedated for the purpose of having the interest thereon become

due and payable at an early day in furtherance of the fraudulent purpose aforesaid, and enable said parties to the better carrying into effect their fraudulent scheme of making and causing to be made a foreclosure and sale of the said Pacific Railroad; wherefore, defendant says that the complainant having a full knowledge of all the facts in the premises comes not into court with clean hands, and is not entitled in equity to any aid or relief from this honorable court. 186

Defendants further answering say, that as they are informed and believe, and have reason to believe, and upon information and belief, charge the fact to be, that said complainant, Ketchum, fraudulently conspired, confederated and combined with Andrew Pierce of Boston, Joseph Seligman, Clinton B. Fisk, directors of the Atlantic & Pacific Railroad 187 Company, and with James Baker, director and attorney for the Pacific Railroad, as also attorney for the Atlantic & Pacific Railroad Company, for the foreclosure by consent of said third mortgage in fraud of the rights of all unsecured creditors and stockholders of said Pacific Railroad, and a majority of the directors of both of said companies consenting, did file, cause and permitted to be filed, in the name of said Ketchum, at the request and procurement of said parties, and in furtherance of the fraudulent conspiracy and combination so formed, and entered into for the defrauding of the stockholders and *bona fide* creditors of said Pacific Railroad, the said bill of foreclosure, that the same was by the said parties caused to be prepared before the said first coupons upon said third mortgage bonds, so antedated, as aforesaid, fell due. 188 That the stockholders of the Pacific Railroad held a meeting in the city of New York, on the 3d day of November, three days after said suit had been commenced, which meeting was addressed by said Andrew Pierce and Clinton B. Fisk, and at which said Wm. H. Coffin was present. That at said meeting, the fact that said suit had been commenced or contemplated was carefully withheld and concealed from the stockholders by said Pierce and Fisk, and in no part of the remarks made by either of them to said meeting was any allusion made to the commencement, or threatened commencement, of said foreclosure suit.

That the affidavit of the complainant to the printed bill

189 filed in this court, was made on the 3d day of November last, and soon thereafter the same was filed in this honorable court, at the procurement of the majority of the directors of the Atlantic & Pacific Railroad Company, and the majority of the directors of the Pacific Railroad, the attorney and law officers of both companies consenting thereto; all which is against equity and good conscience.

And defendant further answering shows and says, that he is informed and believes, and has reason to believe, and upon information and belief charges the fact to be, that the said fifteen hundred thousand dollars of so-called "Income Bonds," issued September 2, 1872, and mentioned in said alleged mortgage, were fraudulently issued by the procurement of the
190 directors of the Atlantic & Pacific Railroad Company while in possession of the Pacific Railroad, and in control of all its affairs under said pretended lease; that said "Income Bonds" were fraudulently issued on the pretence of paying a fictitious indebtedness of the said Pacific Railroad for permanent improvements of the tracks, road-bed and bridges of the same; that as defendant is informed and believes, no such improvements had been made, and such pretended indebtedness did not exist. That the said two million of so-called "Improvement Bonds," issued on the 15th day of December, A. D. 1874, were in like manner fraudulently issued for pretended permanent improvements which were never, in fact, made on said Pacific Railroad.

That as respondent is informed and believes, and has reason to believe, and upon information and belief alleges the fact to
191 be, the said Pacific Railroad was, on the 29th of June, 1872 when the same was taken into possession by the Atlantic & Pacific Railroad Company, in good repair and condition as a first-class railroad; its bridges mostly new, and its road-bed, ties and rails in good condition, and the floating debt of said corporation amounted to no more than about $263,000; that the income of said road was amply sufficient, if properly applied, to pay all operating expenses of said road, and to pay the interest on its bonded debt, and all taxes, and to pay in full the small floating debt then existing. But defendant answering, shows and says, that he is informed and believes,

and has reason to believe, and upon information and belief 192 alleges the fact to be, that Andrew Peirce, Jos. Seligman, Clinton B. Fisk, Wm. H. Coffin and others, composing a majority of the directors of the Atlantic & Pacific Railroad Company, fraudulently conspiring, combining and confederating with James Baker and others, constituting a majority of the directors of the said Pacific Railroad, to defraud the stockholders and unsecured creditors of said Pacific Railroad, particularly the county of St. Louis, creditor to the extent of $700,000, did misappropriate the funds of the said Pacific Railroad Company, and fraudulently conspiring, combining, and confederating to obtain the control and ownership of the said Pacific Railroad, freed from all claims of the stockholders and *bona fide* creditors, fraudulently issued, and caused to be 193 issued, the said "Income Bonds" and "Improvement Bonds," and at nominal prices distributed said bonds among themselves and their associates, and for the purpose of, and in furtherance of the said conspiracy and combination so formed and entered into, to defraud the stockholders and unsecured creditors in manner as aforesaid, issued and caused and procured by the means, and in the manner as aforesaid, the said "Third Mortgage Bonds" to be issued and provided for the exchange of said "Income Bonds" and "Improvement Bonds," with the intent and for the purposes as aforesaid.

And defendants further answering deny, that the Pacific Railroad is unable, if properly managed, to pay its valid and legal obligations in full as they become due, and denies that 194 any commercial paper legally and properly made and executed by said Pacific Railroad has been protested, for the reason that no such commercial paper has, since June 1st, 1872, been properly and legally made by said company. But defendants admit that the Atlantic & Pacific Railroad Company is without sufficient means to pay and discharge its valid obligations in full as they become due, as complainant hath alleged. And respondent further says, that said Atlantic & Pacific Railroad Company are bankrupt and insolvent, and are wholly unable to pay any unsecured claims against them. That their mortgage creditors are pressing their mortgage claims to foreclosure, and seeking for a sale of all the premises known as the

195 Atlantic & Pacific Roilroad, as will more fully appear by reference to the suit of Littlefield *vs.* The Atlantic & Pacific Railroad Company and others, now pending in this court, and to the complaint and pleadings in which suit your petitioner begs leave to refer, as need may occur in the progress of this suit.

And defendants further answering admit, that the interest upon the first and second mortgages upon the Pacific Railroad has been regularly paid as the same became due, and that the premises covered by said mortgages are ample security for the payment of the bonds secured by these two mortgages. And respondent admits that a receiver should be appointed, as prayed for by complainant, but not for the reasons and causes
196 by him alleged, but for the protection of the stockholders and unsecured creditors of said road, whose interests are endangered in the premises, as against the fraudulent conspiracy and combination of the directors, as hereinbefore stated. All which matters and things, defendants are ready and willing to aver, maintain and prove, as this honorable court shall direct; wherefore defendants say that by reason of the matters and things herein set forth and shown to this honorable court, no foreclosure should be granted, or sale made, under said third mortgage, but that said mortgage should be declared to be, by reason of the matters herein stated, null and void, and of no binding force or effect in law or equity; and defendants pray for such further and other relief as to the court shall seem meet, and as to equity and good conscience appertains.

197 FRANK J. BOWMAN,
Solicitor for Thos. P. Akers
and the County of St. Louis.

BRITTON A. HILL,
Of Counsel.

UNITED STATES OF AMERICA, } ss.:
Eastern District of Missouri, }

Herman Rechtien, being duly sworn on oath, says: That he is, and since December third, A. D. 1874, has been county treasurer of the county of St. Louis; that, as such officer, he has special charge of the financial affairs and moneys of said county, and, as an officer of said county, has given special 198 attention to the matter of its claim against the Pacific Railroad; that he has carefully read the above and foregoing answer; that of, and concerning the matters stated therein, he has made special inquiry, and the same are true according to his best knowledge, information and belief.

M. Rechtien,
Co. Treasurer,
St. Louis Co., Mo.

Subscribed and sworn to before me,
this 25th day of April, 1876,

C. M. Ward,
U. S. Commissioner,
Eastern District of Missouri. 199

Adjourned Term, June, 1876.

And afterwards, to wit, on the 5th day of June, A. D. 1876, the following answers were filed in said cause, to wit:

Answer of Rufus J. Lackland and Dwight Durkee to the bill of complaint herein:

And now, on this day come the defendants, Rufus J. Lackland and Dwight Durkee, by A. M. Gardner, their solicitor, and for a separate answer to the bill of complaint in this cause say, that true it is that the said Pacific Railroad executed the mortgage or deed of trust, and the several series of bonds mentioned and set forth in said bill of complaint, and that the said 200 Rufus J. Lackland and Dwight Durkee were made trustees in and by the said mortgage executed to them on the 19th of April, 1872, to secure eight hundred thousand dollars in bonds of the same date, and of the charter and description mentioned in said bill of complaint, and now are such trustees. And they further say that, they know of no reason why the prayer of complainant's bill should not be granted.

A. M. Gardner,
Solicitor for Defendants,
Lackland and Durkee.

And also, on the said 5th day of June, A. D. 1876, the following answer was filed in said cause, to wit:

201 Now comes the Atlantic & Pacific Railroad Company, defendant in the above entitled cause, and files this its answer under its seal, to the bill of complaint in the above entitled cause, and says, that the allegations and averments in said bill are true. This defendant says that it is true that it is a corporation created in the manner and with the powers mentioned in said bill. That it is also true, that the Pacific Railroad is a corporation with the powers mentioned in said bill, and that said last named corporation executed the several mortgages and conveyances, mortgages and deeds of trust in said billl of complaint mentioned, were duly executed and delivered as therein stated. It is also true, as this defendant is advised and beleives, that all of said mortgages and deeds of trust were executed in good faith and for the sole purpose of properly securing the just debts of said Pacific Railroad. This defendant further says, that it it is also true, at the time and in the manner alleged, the said Pacific Railroad did make the said lease of date of June 29th, 1872, to this defendant, the terms of which lease are correctly stated in substance in said bill; and it is also true, that this defendant is in default in compliance with the provisions of the said lease required of it as stated in said bill. It is also true that there is a large sum of money due for taxes remaining unpaid for which both this defendant and the Pacific Railroad were at the date of the institution of this suit. It is also true, that this defendant and the Pacific Railroad are both without sufficient means to pay or discharge their several valid obligations, and that the commercial paper of each of said corporations has been protested for non-payment. This defendant knows of no reason why the plaintiffs in the above entitled suit should not have their lien and rights, as set out in said bill enforced. And this defendant prays the court to protect all its rights and interests in the premises.

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ATLANTIC & PACIFIC RAILROAD Co.,
[SEAL.] By SAMUEL HAYS,
Vice-President.

J. N. LITTON,
Of Counsel and Solicitor for the
Atlantic & Pacific Railroad Co.

And also, on said 5th day of June, A. D. 1876, the following other answer was filed in said cause, to wit: 204

Answer of Uriel A. Murdock, Luther C. Clark, Edwin D. Morgan, Joseph Seligman, James Baker and Jesse Seligman, to the bill of complaint herein:

And now, on this day came the defendants Uriel A. Murdock, Luther C. Clark, Edwin D. Morgan, Joseph Seligman, James Baker and Jesse Seligman, by James Baker, their solicitor, and for answer to the bill of complaint in this cause say, that true it is, that the said Pacific Railroad executed the several mortgages or deeds of trust, and the several series of bonds mentioned and set forth in said bill of complaint, and that the said Murdock and Clark were made trustees in and by the said 205 mortgage executed to them on the 15th day of July, 1868, to secure seven millions of dollars in bonds of the same date, and of the character and description mentioned in said bill of complaint, and now are such trustees, and that the said Morgan and Joseph Seligman were made trustees in and by the said mortgage executed to them on the first day of July, 1871, to secure the payment of three millions of dollars in bonds of the same date, which are of the description mentioned in said bill, and now are such trustees. It is also true, that the said Baker and Jesse Seligman were made trustees in and by the said mortgage executed to them on the first day of October, 1873, to secure the payment of a series of bonds of the same date, amounting in the aggregate to five hundred thousand dollars. 206

It is also true, that the interest on all of the aforesaid bonds have been regularly and promptly paid at maturity, according to the tenor and effect of said bonds.

These defendants ask that the interest and rights of the holders of said bonds, and that the rights and powers of these defendants may be fully protected by this honorable court.

James Baker,
Solicitor for said Defendants.

207 And afterwards, to wit, on the 6th day of June, A. D. 1876, the following answer was filed in said cause, to wit:

George E. Ketchum et al.

vs.

The Pacific Railroad et al.

The defendants, Henry F. Vail and James D. Fish, by Noble & Orrick, their attorneys, answering the bill of complaint of the said George E. Ketchum, say:

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1st. That it is true, as alleged in said bill of complaint, that they are trustees in the deed of trust therein described, dated July 10th, 1875, made by the said Pacific Railroad to these defendants, as trustees.

2d. These defendants admit the allegations of said bill of complaint are true, as they are informed and believe.

And these defendants, as trustees of the several and varied interests of the bondholders secured by said deed of trust, submit the same to the judgment of this honorable court, that the same may be duly provided for and protected, and ask that 209 they may have such relief, including an allowance for their costs and expenses herein, as to your honorable court may seem meet.

Noble & Orrick,
Attorneys for
Vail and Fish,
Defendants.

Answer under oath is hereby waived.

Cline, Jamison & Day, and
James O. Broadhead,
Attorneys for Complainants.

And afterwards, on the 6th day of June, 1876, the following further proceedings were had in said cause, to wit : 210

GEORGE E. KETCHUM ET AL.,
Complainants,
vs.
PACIFIC RAILROAD ET AL.,
Defendants.

Now comes Thomas P. Akers and the County of St. Louis, by Frank J. Bowman, Esq., their solicitor, and by leave 211
of court, dismiss the cross-bill filed herein, and withdrew the answer of said St. Louis County thereto, without prejudice to the lien claim of said county in this behalf.

ADJOURNED TERM.

And on the said 6th day of June, 1876, the following further proceedings were had in said cause, to wit :

DECREE OF FORECLOSURE AND SALE.

GEORGE E. KETCHUM ET AL.,
Complainants, 212
vs.
THE PACIFIC RAILROAD, THE ATLANTIC & PACIFIC RAILROAD COMPANY, *et al.*,
Defendants.

In Chancery.
No. 703.

And now, at this day come the said complainant, by James O. Broadhead, his solicitor, and Cornelius K. Garrison, who, by the order of this court, has been made a co-complainant herein, by his solicitors, Cline, Jamison & Day, and also James

213 Seligman and Thomas W. Pierce, who have also, by the order of this court, been made co-complainants herein, by their solicitors, Grover & Ellis; and also the defendants, The Atlantic & Pacific Railroad Company, by its solicitor, Joseph N. Litton, and The Pacific Railroad by James Baker, its solicitor; and the said Rufus J. Lackland and Dwight Durkee, appearing by their solicitor, A. M. Gardner, and the said Jesse Seligman, Edwin D. Morgan, Uriel A. Murdock, Joseph Seligman, Luther C. Clark, appearing by their solicitor, James Baker, and the said Henry F. Vail and James D. Fish, appearing by their solicitors, Noble & Orrick; and the said James Baker appearing in his own proper person; and it having been suggested to the court that James Punnett has departed this life 214 since the institution of this suit, it is ordered by the court that this suit abate as to him.

And therefore, the said cause coming on to be heard upon the bill of said complainant, and the answers of said defendants, and the exhibits and proofs in the cause, the County of St. Louis and Thomas P. Akers appear by their solicitor, Frank J. Bowman, and dismiss their answers and cross-bills, and Frank J. Bowman, as solicitor for the County of Louis, withdraws the separate answer of the county contesting the validity of said bonds; and it appearing to the court that the Pacific Railroad did, on the 10th day of July, A. D. 1875, make and deliver to the said Henry F. Vail and James D. Fish, its mortgage or deed of trust, of that date, by which the said Pacific Railroad did convey and mortgage to the said Vail and Fish 215 all the property, real and personal, rights, interests and franchises of the said Pacific Railroad, as set forth in the said mortgage of the date last above referred to, and more particularly described as follows, that is to say:

1. All and singular the entire line of the Pacific Railroad [of Missouri], two hundred and eighty-three miles in length, extending from the depot at Seventh street, in the city of St. Louis, State of Missouri, to the western boundary of said State, at Kansas City, and passing through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Moniteau, Morgan, Cooper, Pettis, Johnson, Cass, and Jackson, in said State of Missouri,

with its appurtenances, including, among other things, the track 216 on Poplar street and the Levee, in the city of St. Louis, commonly known as the "Poplar Street Track," and including the real estate, depots, stations, machine-shops, rolling stock, machinery, rights, and interests and franchises of said railroad, subject to the liens of the two mortgages described in the bill of complaint, severally executed by said Pacific Railroad, one of which was so executed to said Murdock, Punnett and Clark, and the other of which was executed to Edwin D. Morgan and Joseph Seligman.

2. All and singular the following described real estate in the city of St. Louis, State of Missouri, viz: Four blocks of ground in the city of St. Louis, being city blocks numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three 217 bounded east by Seventh street, south by Cerre street, west by Eleventh street, and north by Poplar street.

Also block number two hundred and thirteen, of the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street—saving and excepting therefrom lots 26, 29, 33 and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block, sixty-six feet eight inches on Fourteenth street, by one hundred feet on Austin street.

Also the following described real estate in city block number 218 four hundred and thirty-eight, viz:

Beginning at the northwest corner of Eleventh and Cerre streets in the city of St. Louis, the southeast corner of said block; thence west along the north side of Cerre street one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east, parallel to Cerre street one hundred and fifty-two feet and six inches to Eleventh street; thence southwardly on the line of Eleventh street to the place of beginning.

Also the following, viz: Commencing at the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerre streets; thence north

219 one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerre street; thence west one hundred and fifty-two feet six inches to Twelfth street the place of biginning.

And also the following described tract or parcel of land, viz: Commencing at the northwest corner of city block number four hundred and thirty nine, the south east corner of Twelfth and Cerre streets; thence south one hundred and seventy six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly along said south line to the northeast corner of said block four hundred and thirty-nine; thence along the south line of Cerre street to the place of beginning; 220 being the same property mentioned and discribed in the bill of complaint as covered by the mortgage executed to Lackland and Durkee, and said premises being conveyed subject to the lien of said last mentioned mortgage.

3. All and singular the branch railroad of the said Pacific Railroad, constructed and operated, and extending from a point on the main line at or near Kirkwood, thence to the termination of the said railroad at the Mississippi river at Carondelet or South St. Louis, with its appurtenances, including the depots, stations, machine-shops, superstructures, and erectiontions on the line of said branch railroad, or at Carondelet aforesaid, together with all the side tracks and switches connected with said branch railroad, and also all the lands acquired and appropriated, or that may be acquired or appro- 221 priated for depots, engine-houses, car-houses, station-houses, warehouses, machine-shops, or other superstuctures and erections, on the line of said branch railroad, or at Carondelet aforesaid; which said last mentioned premises and property were so mortgaged, subject to the lien of a mortgage, to Jesse Seligman and James Baker, described in the bill of complaint.

Which said deed of trust or mortgaged, dated July 10th, 1875, was made to said Vail and Fish, described in the bill of complaint, as trustees and in trust to secure the payment of an issue of four thousand bonds, therein termed "Third Mortgage Bonds," of one thousand dollars each, dated July 10th, 1875, payable twenty years after date, to bearer in lawful money of the

United States, at the office of the Atlantic & Pacific Railroad 222 Company, in New York, with interest at seven per cent. per annum, from May 1st, A. D. 1875, in like lawful money, semi-annually on the first of November and May in each year, on the presentation of the coupons annexed to said bonds. And it further appearing that said mortgage or deed of trust provides that if the said Pacific Railroad should fail to pay the interest on any of the said bonds thereby secured, for six months after the same should become due and payable and demand made therefor, said trustees were authorized and required, on the written request of the holders of bonds to the amount of five hundred thousand dollars, the principal or interest of which should then be in arrears or unpaid, to sell the said railroad and branch road in the complainant's bill described and 223 set forth, and all the property by said mortgage conveyed, at public auction in the city of St. Louis, at the time, on the terms and in the manner set forth and described in the said mortgage; and to apply the net proceeds of said sale to the payment of all the bonds secured by said mortgage and then unpaid, *pro rata*.

And it further appearing that the said Pacific Railroad had, prior to the said 10th day of July, A. D. 1875, issued its bonds amounting in the aggregate to the sum of fifteen hundred thousand dollars, and designated as "Income Bonds," each of which bonds was dated September 2d, 1872—and of which one thousand were for one thousand dollars each, and eight hundred were for five hundred dollars each, and one thousand 224 for one hundred dollars each, payable on the first of September, 1892, with interest at seven per cent. per annum—on the first of March and September of each year; and it further appearing that the said Pacific Railroad had made a further issue of bonds, amounting in the aggregate to the principal sum of two millions of dollars, and designated as "Improvement Bonds," consisting of two thousand bonds of one thousand dollars each, and dated December 15th, 1874, payable on the first of November, 1889, with interest at seven per cent. per annum, payable on the first of May and November in each year, on the presentation of the coupons annexed to said bonds; and it further appearing to the court that by the terms of said

225 "Third Mortgage" it was provided that the said third mortgage bonds should be used in retiring and canceling the said issue of income bonds and improvement bonds, so far as the same could be done; and it further appearing that the entire amount of third mortgage bonds secured by said mortgage were issued by said Pacific Railroad, and that a sufficient number of said bonds were placed in the hands of the trustees in said third mortgage, mentioned, to wit: the said Vail and Fish, for the purpose of being exchanged for "Income" and "Improvement Bonds;" and it further appearing that a portion of said bonds have been exchanged for "Income" and "Improvement Bonds," and that a portion of said bonds have been negotiated by said company; and it further appearing
226 that a number of said bonds are now in the possession of the said trustees, Vail and Fish; and it further appearing that of the said third mortgage bonds now outstanding, none of the interest which became due on said bonds, or any of them on the first day of November, A. D. 1875, has been paid, but that the whole amount thereof remains due and unpaid; and it further appearing that the said complainant, George E. Ketchum, is the holder and owner of ten of said "Third Mortgage Bonds," secured by the aforesaid mortgage or deed of trust; that the said Cornelius K. Garrison is the owner and holder of fourteen hundred of said bonds, and that the said James Seligman is the owner and holder of three hundred and forty-seven of said bonds; and that the said Thomas W. Pierce is the owner and holder of fifty of said bonds, secured by said mortgage, and
227 that the payment of the interest which became due on said eighteen hundred and seven bonds on the first day of November, A. D. 1875, was duly demanded on said day according to the tenor of said mortgage, and that the coupons representing said interest were presented for payment at the place where the same by the terms thereof are payable, and payment thereof demanded and refused. And it further appearing to the court that the interest of the said complainant, and the interests of other holders of like bonds, may be seriously affected by delay in the institution of proceedings to foreclose the said mortgage, inasmuch as by the terms of said mortgage the said trustees are not authorized to sell the property secured by said

mortgage until six months after demand made for the payment 228
of said interest.

Now, therefore, the court being fully advised in the premises, and by the consent of all the parties to this suit, through their solicitors of record, thereupon and in consideration thereof, it is, ordered, adjudged and decreed, as follows, to wit:

That the said Pacific Railroad do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, property and franchises, and that the said Pacific Railway and property, together with the franchises and appurtenances of the said railway company as in said deed of trust or mortgage, dated July 10, 1875, is described, be sold at public auction by Seymour D. Thompson,
Master in Chancery of this court, to pay and satisfy the amounts 229
due by said company upon said bonds, and any other indebtedness which the court may order to be paid out of the proceeds of said sale, together with the costs of suit and of said sale, including the services of said trustees and their solicitor's and attorney's fees in and about the management of said trust as may hereafter be ordered by this court; and that upon said sale the said master shall execute a certificate stating such sale and setting out the terms and conditions thereof, and that he report said sale and the terms and conditions thereof immediately after said sale to the court; and that upon the terms of such sale being complied with, and the sale approved and confirmed by the court, said master be, and he is hereby, authorized and directed to execute and deliver to the purchaser or
purchasers of said property good and sufficient deed or deeds 230
for the same.

And it is further ordered, that upon the sale of the said road, property and franchises, the said Seymour D. Thompson, master, shall require the payment by the purchaser of the sum of at least two hundred thousand dollars in cash, or the delivery to him of a good and sufficient bond with sureties to be by him approved, for the payment of such sum of $200,000, when and as soon as thereto required by the court.

And it is further ordered and decreed that the terms and conditions of said sale shall be the payment of said sum of two hundred thousand dollars cash, or the execution and delivery

231 of the bond hereinbefore specified, on the delivery of the certificate of sale by said master, and that the balance of the sum bid shall, unless the purchaser be a bond holder, or shall represent bond holders, be paid in cash at the confirmation of said sale, should said sale be confirmed; and if said purchaser shall be a bond holder, or represent *bona fide* bond holders, then and in that event should said sale be confirmed, he shall pay, or cause to be paid, in cash said sum of two hundred thousand dollars, and also the *pro rata* proportion from the proceeds of such sale, which may be by the said court then found due to the other *bona fide* bond holders, and the balance after such cash payment may be paid in bonds, *bona fide* owned or represented by him, the court expressly reserving for future
232 consideration all questions as to the rights, priorities and interests of all parties claiming any interest herein by way of bonds or otherwise.

And it is further ordered that the said master shall designate the time of making such sale, and shall advertise the same, together with a description of the property and franchises to be sold, by publication showing the time, terms and place of sale and the property and franchises to be sold, to be inserted in the *St. Louis Globe Democrat*, published in the city of St. Louis, Missouri, in the *Evening Post*, published in the city of New York, and in the *Boston Journal*, published in the city of Boston for the period of sixty days in each of said newspapers, the same to be inserted in each of said papers once a week during the first three weeks of said period, three times a
233 week during the second three weeks of said period, and once every secular day during the remaining portion of said period of sixty days, the last insertion to be at least two weeks before the day of such sale. And the receivers are directed, on the certificate of the master, to audit and pay the expenses of such advertising, and also the expenses of printing this decree.

It is further ordered, adjudged and decreed that all the premises, property and franchises covered by, and embraced in, the said mortgage sued on, viz.: the mortgage dated July 10th, 1875, shall be sold in a body and not separately, so that the purchaser or purchasers, at said sale shall acquire the whole of the property, premises and franchises embraced in said last named mortgage, subject to all prior mortgages.

It is further ordered, adjudged and decreed that in case said road, property and franchises shall be purchased by bondholders, or by trustees for bond holders, then at any time within sixty days after said sale any *bona fide* holder or holders, of said third mortgage bonds, secured by the mortgage sued on in this case, shall be allowed to become associated with said original purchaser or purchasers, in the property purchased, in the proportion that the bonds so held by him or them bears to the whole number of bonds issued, upon the same terms and conditions, with the same rights, subject to the same burdens and under the same scheme as may be provided for or agreed upon by said original purchaser or purchasers, for the purchasing and managing the property purchased, or for creating a corporation to which said property may be conveyed, provided that at the time of his election to share in such purchase he shall pay his proportion of the money and expenses paid by the original purchaser. 234 235

It is further ordered, adjudged and decreed that any person, or persons, holding any of the "Income Bonds," or the "Improvement Bonds," above referred to, be, and they are hereby authorized at any time before the sale of said property, to exchange their income or improvement bonds for third mortgage bonds now held by the said trustees, Vail and Fish, as is provided in said third mortgage.

It is further ordered, adjudged and decreed that nothing in this decree contained shall be construed to prejudice in any manner the claim of the county of St. Louis to a lien on the property and franchises of the said Pacific Railroad, alleged by the said county to exist, as fully appears by the amended petition in this cause filed by the said county for securing the payment of a certain debt of the said Pacific Railroad to said county for the sum of $700,000 and interest thereon, and alleged and claimed by the said county of St. Louis to be a prior lien therefor over all other incumbrances upon said property and franchises, the question of the existence and priority of said lien to be hereafter determined by this court—if not otherwise satisfactorily adjusted. 236

And it is further ordered and decreed that nothing herein contained, or proceedings had in this cause, shall in any man-

237 ner affect the rights of the Boonville Branch Railroad, or its rights to rent therefor.

It is further ordered, adjudged and decreed that any party purchasing under this decree shall, in addition to the two hundred thousand dollars provided to be paid as above, pay in cash such further sum not exceeding two hundred thousand dollars as and when this court may require and direct to be paid, for the purpose of satisfying any statutory, equitable or other lien claims that have been, or may be, filed in this case, or in the case of Calvin Littlefield *v.* The Atlantic & Pacific Railroad Company and others, pending in this court, and which have been, or may hereafter be, directed by the court to be paid by the receivers, of either of said companies, and which,
238 on a hearing and final accounting had between the receivers of the said Atlantic & Pacific Railroad Company and the receivers of the said Pacific Railroad, in respect to said liens and payments may be found to be due and owing to the receivers of the said Atlantic & Pacific Railroad Company.

And afterwards, on the 18th day of September 1876, the following motion to confirm sale was filed, to wit:

IN THE UNITED STATES CIRCUIT COURT,

For the Eastern District of Missouri.

239 George E. Ketchum

vs.

The Pacific Railroad, and others.

In Chancery.

Now comes the above named complainant by his solicitor, and moves the court to confirm the report of sale made by Seymour D. Thompson, in the above entitled cause, under the order of this court, of the railroad and other property of the said Pacific Railroad and the other property therein named.

Jas. O. Broadhead,
Sol. for Complainant.

And afterwards, on the 6th day of October, 1876, the folowing further proceedings were had in said cause, to wit: 240

George Ketchum et al.,
Complainants.
vs.
The Pacific Railroad et al.,
Defendants.

Now at this day come the complainants by their solicitors, and moved the court to confirm the sale of the Pacific Railroad, 241 and its property and appurtenances, and the franchises of said Railroad Company, and the real estate and other property mentioned and described, in the order of sale made by this court at its last term, in this cause, and it appearing to the court from the report of Seymour D. Thompson master, appointed to make such sale, that the order of this court authorizing and requiring the said Seymour D. Thompson to make said sale, has in all respects been complied with, and that James Baker became the purchaser of said Railroad franchises, and property above mentioned and referred to, for the sum of three millions of dollars.

Now therefore, it is ordered, adjudged and decreed, that the said sale be and the same is hereby confirmed, according to the 242 terms and conditions of the order of sale heretofore made by this court at its last term, and subject to the claim of the county of St. Louis to a prior lien thereon for seven hundred thousand dollars, and interest thereon as the same has been, or may be established by this court, or by the Supreme Court of the United States in case of appeal.

And be it further remembered, that on the 19th day of September 1876, N. A. Cowdrey and others, filed their certain motion and petition, in words and figures following, to wit:

(Which is omitted from printed record, and the amended

243 petition given in lieu thereof, they are substantially the same, the first gave the name of Pierce as purchaser, when the fact which is shown in the amended bill is, that Baker was the purchaser).

And afterwards, on the 22d day of September, 1876, the said N. A. Cowdrey and others filed the following *amended motion and petition* in said cause, to wit:

CIRCUIT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF MISSOURI.

244
GEORGE E. KETCHUM AND OTHERS
vs
THE PACIFIC RAILROAD AND OTHERS.
In Chancery
May Term, 1876.
No. 703.

Order X

Amended motion for liberty to intervene to set aside decree of June 6th, 1876, and sale and for liberty to demur, answer, plead or appeal as advised.

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245 Your orators, N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marié, Frank A. Otis, Jacob Cromwell and George L. Kingsland, all citizens of the city and State of New York, and George R. Fearing, a citizen of Newport, State of Rhode Island, humbly and respectfully petition and show to this court:

1st. That they are, in the aggregate, the owners of ten thousand shares of the capital stock of the Pacific Railroad, defendant in the above entitled suit, of the nominal or par value of $1,000,000; that your orators, as a committee or agents, or other holders of the same stock, represent, and have most of the stock represented by them in the actual custody of your committee, shares of said Pacific Railroad stock to the amount in the aggregate, of about thirty-five thousand shares, which are of the par or nominal value of $3,500.000. 246

2d. That your orators bring this petition not only for their own benefit, but for the benefit of all other holders or owners of the capital stock of said Pacific Railroad, who come in and contribute to the cost and expenses necessary for the prosection of this suit.

3d. That the defendant, the Pacific Railroad (of Missouri), is a railroad company about 283 miles in length, extending from its depot in the city of St. Louis to Kansas City, on the western boundary of the State of Missouri, passing through Jefferson City, the capitol of the State. 247

That it is mortgaged as follows:

The first Mortgage at 6 per cent gold,		$7,000,000	
The Second " " 7 " U. S. currency,	Less payment made by the Court on Sinking Fund.	2,741,000	
3. The County of St. Louis 7 per cent,		750,000	
		$10,491,000	
4. The Mortgage sought to be foreclosed in this suit, the validity of which is denied by your orators interest 7 per cent		4,000,000	
Real Estate Bonds @ 7 per cent		800,000	248
Car. Branch Bonds, @ 7 per cent		500,000	
Making a total of		$15,791,000	

inclusive of the disputed mortgage, and the amounts, to your orators unknown, paid by the court on said sinking fund, the annual interest on which at 7 per cent, the sum of $1,105,370.

The earnings of the mortgaged premises and its leased lines

249 of road have been, as reported by the various persons in charge, for the time below named, as follows:

1869.	Gross, $3,213,000.	Net, $973,000
1870.	" 3,500,000.	" 945,000
1871.	" 3,598,000.	" 946,800
1872.	" 3,606,004.	" No report.
1873.	" 3,708,600.	" 1,402,715
1874.	" 3,713,000.	" 1,451,889
1875.	" 3,200,000.	" No report.

The road was placed in the hands of this court in the latter part of 1875. The officers of the court, the receivers, report 250 the gross earnings of the mortgaged premises and its leased lines to have been, since December 30, 1875, to August 31, 1876—eight months—$2,312,357, which they report to be an increase over the corresponding period in 1875, of $470,767. The earnings for the best part of the year, the months in which the crops are more largely moved, and more supplies wanted in the country in return for said crops, viz.: September, October, November and December, are yet to be made and added to said $2,312,357. The indications are, as your orators believe and aver, that the earnings this year, 1876, will be at least $4,000,000.

Your orators aver, that sixty per cent. of tho gross earnings is a full and large allowance for operating expenses, and that, allowing sixty per cent. for expenses, the forty per cent. net 251 earnings, viz.: $1,600,000, is a sum more than sufficient to pay the annual interest upon all the mortgage debts of the defendant, the Pacific Railroad—including the $4,000,000 disputed mortgage, upon which this suit is brought—which annual interest, as above shown, is the sum of $1,105,370.

Your orators aver that some of them have had long and varied experience in the litigation pertaining to railroads in this country, extending through a period of about twenty years, and that they have never known, heard or read of any case where a court of equity has enforced the foreclosure of a mortgage where the property in the hands of the court itself was earning enough to pay the annual interest upon the debt which the court was enforcing the collection of, and they submit, that in this case it is particularly inequitable so to do, because the 252 loan purporting to be secured by the mortgage, by the written terms thereof, submitted to the court, does not become due until May 1st, 1895.

4th. Your orators aver, and charge, upon information and belief, that this court has been imposed upon, and has improvidently made its orders directing its receivers to pay large sums of money from the earnings of the premises in its custody, such as debts contracted by the Atlantic & Pacific Railroad Company, to a very large amount, and to pay very large sums which were junior in priority of lien and in equity, to the lien which this suit was brought to enforce, and to the payment of large amounts as a sinking fund for the redemption or pur- 253 chase of the second mortgage bonds above named, the principal of which does not become due until July, 1891. That the motive of the persons so procuring said improvident orders has been to use and make way with the net earnings and profits of the premises in the hands of the court, so that the same need not be applied in payment of the interest due upon the mortgage being foreclosed, and thus prevent a sale of the mortgaged premises; in other words, if the court had not made an improvident application of the moneys in its hands, the court itself would now have in its hands enough and more than enough money to pay the interest due, which this suit was brought to enforce the collection of.

254

5th. Your orators aver, that the capital stock issued by the defendant, the Pacific Railroad Company, was issued to the amount of about $7,000,000; that the same is held and owned in scattering and mostly small lots by three to four hundred different persons, much of it by women, widows and orphan children, who are obliged, from the necessity of their case, to look to this court to protect them against the combinations and conspiracies to injure them, made and entered into by C. K. Garrison and others, parties to this suit, directly or indirectly; and your orators, in behalf of said women, orphans and unprotected stockholders, submit these facts and averments to this court for its consideration.

255 6th. Your orators show, that at the present term of this court, viz., on the 6th day of June, 1876, the court made an order of sale of the mortgaged premises, and thereupon adjourned to Sept. 18th, 1876; that at the time, or just previous to said order of sale being made, the county of St. Louis withdrew its answer to the complaint, and also a cross-bill filed by them, which was then pending in this case, without any notice to your orators or to the stockholders of said Pacific Railroad; that, also, Thomas P. Akers, Esq., had filed an answer and a cross-bill on his own behalf, and on behalf of all the other stockholders, which was then pending in this court, and which, upon said 6th day of June, 1876, he withdrew, without any notice to the stockholders represented by him; that because of
256 said adjournment of the court, there has been no day since said 6th day of June that your orators could lay their grievances before the court; that the master advertised the premises to be sold upon the 6th day of September, 1876, and at the time and place named in said advertisement he received proposals for the purchase of the mortgaged premises, which proposals he submitted to this court for its confirmation; that the Andrew Pierce who bid in said road at said master's sale on September 6th, 1876, purchased the same for James Baker, who is the solicitor of record of the defendant, Pacific Railroad, and a director in said railroad corporation; that said Pierce was also a director and general manager in said corporation until after the commencement of the original foreclosure suit, and until about the time said decree of sale was made, and that he is the same
257 Pierce that is charged in said bill of said Cowdrey, and in the answers and cross-bills of said county of St. Louis, and of Thomas P. Akers, Esq., as being the general manager and director of the defendant, the Pacific Railroad, and as having illegally combined and conspired with others to wrong the stockholders of said Pacific Railroad, by issuing said third mortgage, and then instituting a suit in the name of said Ketchum to foreclose the same, to the utter destruction of the stock interest in said Pacific Railroad. And that the said James Baker, solicitor of said Pacific Railroad, is the same person that, as such solicitor, consented to said decree, and was one of the sureties of said Pierce for the payment of $200,000

to the master, as required by said decree; and that he is one 258
of the defendants in said Cowdrey bill, and charged in said bill
and in the answer and cross-bill of the county of St. Louis, and
of Thomas P. Akers, as combining and conspiring with others
to wrong and defraud the stockholders of said Pacific Railroad,
by whom he was elected a director or trustee, to represent and
to act for them.

7th. Your orators further aver, that at the annual meeting of the stockholders of the defendant, the Pacific Railroad, held in St. Louis, March 27th, 1876, the stockholders unanimously passed the following resolution:

"*Resolved*, That the stockholders respectfully request the 259
"directors to employ Messrs. Glover & Shepley to aid in de-
"fending the company in foreclosure suits now pending against
"it (this suit), and also the proceedings in bankruptcy pending
"against the company."

That the directors, in bad faith to the stockholders, and without any notice to the stockholders, continued the employment of James Baker, Esq., who, on the 6th of June, 1876, consented to said decree as counsel for the company.

8th. Your orators further show, that the decree of sale made
by this court on the said 6th day of June, 1876, was improvi- 260
dent and illegal, and should be set aside, because, as your ora-
tors aver, the said decree provided as follows: "that in case
said road, property and franchises shall be purchased by bond-
holders, or by trustees for bondholders, then at any time within
sixty days after said sale any *bona fide* holder or holders of said
third mortgage bonds, secured by the mortgage sued on in this
case, shall be allowed to become associated with said original
purchaser or purchasers, in the property purchased, in the pro-
portion that the bonds so held by him or them bears to the
whole number of bonds issued, upon the same terms and condi-
tions, with the same rights, subject to the same burdens, and
under the same scheme as may be provided for or agreed upon

261 by said original purchaser or purchasers, for the purchasing and managing the property purchased, or for creating a corporation to which said property may be conveyed, provided that at the time of his election to share in such purchase, he shall pay his proportion of the money and expenses paid by the original purchaser."

Your orators aver, that the above improvident provision in said decree had the direct effect to deter bidders at said master's sale; that if any person desiring to purchase the premises, and owning five or ten bonds, bid at such sale and furnished the entire money, as required by said decree, he might be required, sixty days after he had put up said money, to accept strangers as co-partners with him in said purchase, in the proportion as $5,000 of bonds, if he owned that amount, bears to 262 $4,000,000, the whole amount of the mortgage—that is to say, his interest in the purchase would be reduced to one-eighth of one per cent., or say, 1-800th part, and he would temporarily have to furnish all the money with which to make the purchase. Your orators believe and allege that few, if any, sane business men or capitalists would compete at a foreclosure sale made upon that principle.

9th. Your orators further aver, that said decree of June 6th, is improvident and illegal, because they say that it does not find any fixed amount of debt to be due the complainants, but leaves the same unsettled and undetermined; if by implica- 263 tion it finds it to be the amount of the principal and interest, then your orators aver, that the complaint in this case, by the exhibit attached thereto, the same being a copy of the mortgage which this court is asked to foreclose, shows that the principal of said debt, viz., $4,000,000, is not due until May, 1895; that the complaint and the decree itself shows that the whole amount of $4,000,000 was not issued, but that millions of dollars were held to be exchanged for income and improvement bonds, which your orators aver, may never be exchanged, and whether they are or not, the court should, by its master, find the exact amount of the debt due them, secured by said mortgage for which the foreclosure sale was ordered to be made; that the court improvidently and illegally omitted to

require an account from its receivers, to the end that what 264
money was then, or was likely before the sale to come into
their possesaion, might be applied in liquidation of the debt.

Your orators aver, that the court, in said decree of the 6th of June, 1876, has omitted to find the necessary facts upon which to base said decree as required by the laws of the United States, and by the rules of the Supreme Court of the United States applicable to this canse.

Your orators aver, that said decree, made June 6th, 1876,
is improvident and illegal, in this, that it wholly fails to give
the Pacific Railroad any time within which to pay such or
whatever debt is or ought to have been found to have been 265
due; but declares said Pacific Railroad to be absolutely debar-
red and foreclosed of and from all equity of redemption in and
to said mortgaged premises. Whereas, as your orators aver,
the said decree should have fixed some reasonable time
in the future within which said Pacific Railroad might pay the
debt established by the court, if any such debt was establshed,
or *thereafter* to be barred and foreclosed.

For which reason said decree should be vacated, set aside, and for nothing had.

Your orators aver, that by the 16th section of the constitu-
tion of State of Missouri, "The rolling stock and all other 266
moveable property belonging to any railroad company or cor-
poration in this State shall be considered personal property;"
that the mortgage on which this suit is brought purports to
embrace all the rolling stock, equipment and supples owned by
said Pacific Railroad Compay, which the constitution declares
to be personal property.

Your orators aver, upon information and belief, that said mortgage was never recorded as the laws of the State of Missouri requires that mortgage of personal property should be recorded; and hence they say that said decree of July 6th, 1876, should be set aside, and for nothing had, because it em-

267 braces personal property, concerning which the law has not been complied with.

10th. Your orators aver, that this cause and the decree therein, entered June 6th, 1876, is one "where a writ of error may be a supersede as," and that by the laws of the United States an execution could not issue thereon until the expiration of sixty days from the entry of said decree, which would be on and after August 7th, 1876, the 6th of August being Sunday ; that notwithstanding said law the master issued and advertised his order to sell said premises—which in equity is an execution—on and before June 22d, 1876, which is only sixteen days after the entry of said decree, thus disregarding the 268 law of the United States requiring sixty days to have elapsed after the entry of decree and before the issue of execution.

11th. Your orators aver, that said decree, made June 6th, 1876, is in violation and in total disregard of the statute of the United States, which, by the 983d section of the Revised Statutes, requires "the bill of fees of the clerk, marshal and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of the judgment or *decree* against the losing party ;" that 269 said decree, made June 6th, 1876, wholly omits to tax costs in favor of the prevailing party, as required by said statute. Wherefore, your orators say that said decree is illegal, and should be set aside and for nothing had.

12th. Your orators aver, that in addition to the many and divers reasons why said bonds upon which said complaint is brought, are not a valid debt or a lien upon the property now in the possession of the court, upon information and belief, they allege that the said Pacific Railroad had deposited a large number of said bonds upon which this suit was brought, your orators believe about $2,500,000, with certain national banks organized under the Laws of the United States, among others the National Bank of Commerce of the city of New York, which 270 national banks, contrary to law, made loans upon said bonds. Now, your orators aver, that banks organized under the national banking law, are only authorized to lend money upon personal security, and that they are not authorized to lend upon real estate securities; that railroad bonds are real estate securities; that said banks sold said bonds to the amount of about $1,400,000, to C. K. Garrison, one of the parties to this suit; that said Garrison, and other present holders, took them with full knowledge of the defect in the title to said bonds in said banks, knowing that the banks could give no better title to said bonds than they themselves had, and that the courts had construed this law, saying that the national banks could neither take or give title to railroad bonds or other real estate securities 271 (see Fowler *vs.* Scully, 72 Penn. Rep., p. 456); that other amounts of said bonds were sold by said banks to others than Garrison, who now claim to hold said bonds as a valid lien against the Pacific Railroad, defendants; that because of said defect in title, said Garrison and others were enabled to get said bonds at one-half their nominal or par value; that all or nearly all of the present holders of said bonds have acquired them since this suit was commenced, and since the court appointed its receiver to take care of said premises, hence the said bonds are now, and at the time said decree of June 6th, 1876, was entered, are held by the present owners subject to all the equities existing between the makers and the holders thereof at the time said suit was commenced, and at the time of the appointment of receivers by the court. 272

13th. Your orators aver, that previous to the rendition of said decree of June 6th, 1876, the county of St. Louis, on its own behalf as a creditor and a stockholder of said Pacific Railroad, and Thomas P. Akers, Esq., as a stockholder on his own behalf, and on behalf of all other stockholders, each filed their cross-bill and answer to the complaint in this case, and that they each and both withdrew the same on the day said decree was rendered. Your orators pray that they may be allowed to refer to said answers and cross bills as if the same were now pending, and as if they were set out at length in this motion.

273 14th. Your orators aver, that on or about the 2d day of February, 1876, they authorized and procured N. A. Cowdrey, one of the present petitioners for liberty to intervene in this cause, to commence a suit by bill in equity in this court against the Pacific Railroad, the Atlantic & Pacific Railroad Company, Andrew Pierce, of the city of Boston, C. K. Garrison, of New York, and Henry F. Vail and James D. Fish, to whom the mortgage sought to be foreclosed was made in trust to secure the payment of the bonds, and others, directors in said Pacific Railroad, and directors in said Atlantic & Pacific Railroad Company.

That said suit is now pending in this court; that said bill alleges fraud and collusion in the making and issue of said $4,000,000 274 of bonds, on which this suit of foreclosure is brought, commited by Andrew Pierce and others against the stockholders of said Pacific Railroad; that the bill prays, among other things—

For an account to be stated between the Pacific Railroad and the Atlantic & Pacific Railroad Company, the complainant alleging an indebtedness from the Atlantic Railroad Company to the Pacific railroad of $3,000,000, and upwards.

For an account to be stated between the Pacific Railroad and Andrew Pierce, Joseph Seligman and Jesse Seligman, alleging an indebtedness from them to said Pacific Railroad.

For a cancellation of the outstanding income, improvement and third mortgage bonds, alleging the same to have been issued in fraud of the rights of the stockholders of the Pacific 275 Railroad.

For such other and different relief as to equity appertains.

Your orators humbly pray the court to allow them to refer the said bill in equity in said Cowdrey case, the same as if it were set out here at length.

X

15th. Your orators humbly pray the honorable court to take their cause into consideration, and upon finding their allegations and averments to be true, to make an order of this court: that your orators may be allowed to intervene as parties defendants in this cause, and they be authorised to make answer, plead, demur, or to appeal as they by their counsel shall be advised; and that the decree of June 6th, 1876, and sale thereunder, be set aside and for nothing had. Or that you will grant such other relief as to equity appertains. 276

Certain interlineations at folio 22, were made herein before affidavit made hereto.

And your orators as in duty bound will ever pray.

GLOVER & SHEPLEY,
Solicitors.

New York, September 19, 1876.

277

NEW YORK CITY AND STATE,
September 19th, 1876.

Personally appeared before the undersigned authority, authorised by Act of Congress to administer oaths in such cases, N. A. Cowdrey and Robert L. Cutting, Jr., who each being by me duly sworn, made oath that the foregoing instrument or petition is true of their own knowledge, except those matters charged upon information or belief, and that they believe them to be true.

N. A. COWDREY,
R. L. CUTTING, JR.

CLARENCE M. HYDE,
Notary Public for the
[SEAL.] City and County of
New York. 278

279 And at the September Term of said court, on the 3d day of October, 1876, the following further proceedings were had in said cause, to wit:

GEORGE E. KETCHUM ET AL.,
Complainants,
vs.
PACIFIC RAILROAD ET AL.,
Defendants.

280 This day come the said parties by their solicitors, and also come N. A. Cowdrey and others by their solicitors, Messrs. Glover & Shepley, and the motion of said Cowdrey and others for liberty to intervene to set aside the decree and sale herein, was argued by counsel and submitted to the court, on consideration whereof, and being fully advised in the premises, it is ordered by the court that said motion be denied.

It is further ordered, that the motion of N. A. Cowdrey and others for leave to file a petiton to set aside the decree of foreclosure and sale thereunder for want of jurisdiction, be and the same is hereby denied.

281 And afterwards, on the 6th day of October, 1876, N. A. Cowdrey and others filed their petition for leave to intervene, etc., which said petition is as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES, 282

FOR THE EASTERN DISTRICT OF MISSOURI.

GEORGE E. KETCHUM AND OTHERS
against
THE PACIFIC RAILROAD AND OTHERS.

Nathaniel A. Cowdrey, Robert L. Cutting, Jr., Peter Marié Frank A. Otis, Jacob Cromwell, George L. Kingsland and 283 George R. Fearing, and ask the court for leave to file their petition, hereto annexed, to intervene in said cause, and that said decree rendered therein, and that the sale thereunder, be set aside and said cause dismissed, on the ground that the said Circuit Court of the United States, for said Eastern District of Missouri, had no right or power to make any such decree or order, for want of jurisdiction, as appears on the face of the complaint.

N. A. COWDREY,
ROBERT L. CUTTING, Jr.,
PETER MARIE,
FRANK A. OTIS,
JACOB CROMWELL, 284
GEORGE L. KINGSLAND, and
GEORGE R. FEARING,

By GLOVER & SHEPLEY
their Attorneys.

And afterwards, on the 6th day of October, 1876, the following motion was filed, which is as follows, to wit :

285 IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MISSOURI.

GEORGE E. KETCHUM AND OTHERS
against
THE PACIFIC RAILROAD AND OTHERS.
In Chancery, October Term, 1876.

Motion for liberty to intervene to set aside decree of June 6, 1876, in said cause, and for liberty to demur, answer, plead and appeal, as advised.

286 Your petitioners, N. A. Cowdrey, Robert L. Cutting, Jr., Peter Maurié, Frank A. Otis, Jacob Cromwell and George A. Kingsland, all citizens of the city and State of New York, and George R. Fearing, a citizen of Newport, and State of Rhode Island, respectfully petition, and show to this court:

1st. That they are in the aggregate the owners of ten thousand shares of the capital stock of the Pacific Railroad, defendant in the above entitled cause, of the nominal or par value of $,1000,000; and that your petitioners, as a committee of other holders of the said stock, represent and have shares of the stock of said railroad to the amount of about 287 35,000 shares, of the nominal or par value of $3,500,000, and have most of the stock, represented by them, in the actual custody of said committee, and that this petition is presented and filed, not only for their own benefit, but for the benefit of all other stockholders of said Pacific Railroad.

2d. That your petitioners have applied to the said railroad, and to the board of directors of the said Pacific Railroad, for leave, in the name of said Pacific Railroad, to move to set aside the said decree, rendered in said cause, and the sale made thereunder, and to dismiss said cause of said Ketchum and others against said Pacific Railroad and others, on the ground that said court had no jurisdiction of the said cause, as appeared upon the face of the bill of complaint in said cause, 288 and for the use ot the name of said railroad company for that purpose, but said board of directors would not allow your petitioners to file said petition in the name of the railroad, nor would the said board allow the use to the said petitioners of the name of said company for that purpose; and said board of directors, upon demand made to them by your petitioners, would not make such motion.

3d. Your petitioners, therefore, move the court to set aside said decree, and the sale thereunder, as made in said cause, and to dismiss the said cause, for the reason that this court has no jurisdiction in the said cause, and can render no decree therein valid in law, as appears upon the face of said bill of 289 complaint of said complainants.

That it is in said bill of complaint averred, that said complainants were citizens of the State of New York, and that said Henry F. Vail and James D. Fish are trustees, holding the legal title to the property described in the third mortgage of said Pacific Railroad, to foreclose which the said bill of complaint is brought. That the said Henry F. Vail and James D. Fish, together with Jesse Seligman, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett and Luther C. Clark, made defendants therein, are citizens of the State of New York; that said Vail and Fish, so holding the legal title to the property described in said third mortgage, are necessary parties to said cause; no decree therein can be made that by the provisions of the second section of the third Article of the 290 Constitution of the United States, the jurisdiction of the Circuit Ccurt of the United States is confined to controversies between citizens of different States, except only in cases of a controversy between citizens of the same State, claiming lands of different States, which is not the case in said proceedings in said suit; that by the agreements of the said bill said suit is brought by said complainants, citizens of the State of New York, against said company, and said Fish and Vail and others, defendants therein, averred to be citizens of the said State of New York, so that complainants and said defendants, above specified, were citizens of the same State, to wit, the State of

291 New York. That under the provisions of the Constitution of the United States, no such action can be maintained, and that said decree, and the sale made thereunder, were, of necessity, absolutely null and void.

Wherefore, your petitioners pray that said decree, and the sale made thereunder, be set aside, and that said cause be dismissed.

N. A. Cowdrey,
Robert L. Cutting, Jr.,
Peter Marie,
Frank A. Otis,
Jacob Cromwell,
George L. Kingsland, and
292 George R. Fearing,

By Glover & Shepley,
their Solicitors.

And afterwards at said term of court, and on the 7th day of October, 1876, the following further proceedings were had in said cause, to wit.:

George E. Ketchum, et al.,
Complainants,
vs.
293 Pacific Railroad, et al.,
Defendants.

This day again come the said parties by their solicitors, and also come N. A. Cowdrey, Robert L. Cutting, George R. Fearing, Peter Marié, Frank A. Otis, Jacob Cromwell, and George L. Kingsland, by their solicitors, Messrs. Glover & Shepley, who make application for an order allowing an appeal to the Supreme Court of the United States from the order of this court in the matter of N. A. Cowdrey and others, which application being submitted, and duly considered by the court, it is ordered, that said application be, and the same is hereby denied. 294

And be it further remembered, that at the September Term, 1876, of said Circuit Court, and on the 19th day of September, 1876, Mary Robb Miltenberger, by her solicitors filed the following motion and petition for leave to intervene, viz:

(Which is omitted from the printer's record, the allegations are the same, except that she avers that she is the owner of four hundred shares, and that she has not heretofore been represented in this litigation, except by the directors, whom she avers have committed great frauds upon her rights).

And afterwards, at said term of court, and on the 3d day of October, 1876, the following proceeding were had in the said matter of Mary Robb Miltenberger, to wit: 295

GEORGE E. KETCHUM, ET AL.,
Complainants.

vs.

PACIFIC RAILROAD, ET AL.,
Defendants.

296

This day come the said parties by their solicitors, and also comes Mary Robb Miltenberger, by her solicitors, Messrs. Glover & Shepley, and the motion of said Miltenberger for liberty to intervene to set aside the decree and sale herein, coming on to be heard, was argued by counsel and submitted to the court, on consideration whereof, and being fully advised in the premises, it is ordered by the court that said motion be denied.

It is further ordered, that the motion of Mary Robb Miltenberger for leave to file petition to set aside decree of foreclosure and sale thereunder, for want of jurisdiction, be and the same is hereby denied; and thereupon the said Mary R.

297 Miltenberger, by her said solicitors, makes application for an order allowing an appeal to the Supreme Court of the United States, from the said orders of this court, which being submitted, and heard, it is ordered that said application be denied.

UNITED STATES OE AMERICA, } ss.:
Eastern District of Missouri. }

IN THE CIRCUIT COURT OF THE UNITED STATES,

IN AND FOR SAID DISTRICT.

298 Pleas had before the Honorable the Circuit Court of the United States for the Eastern District of Missouri, sitting in equity in a case wherein N. A. Cowdrey is complainant, and the Pacific Railroad and others are defendants.

Be it remembered, that on Saturday, November 13th, 1875, the following appears of record, to wit:

N. A. COWDREY, ET AL.

vs.

THE PACIFIC RAILROAD ET AL.

299

This day come the complainants by Messrs. Hill & Bowman, their solicitors, and file their bill of complaint against the defendants herein; and on motion of said solicitors it is ordered that subpœna in chancery be issued against said defendants, returnable to rules December 6th, 1875.

And thereupon process was duly served on all the defendants within the State of Missouri.

And afterwards, on the 3d day of December, 1875, the fol- 300
lowing appears of record in said cause, to wit:

N. A. Cowdrey, et al.,
Complainants.
vs.
The Pacific Railroad, et al.,
Defendants.

Now come defendants, Rufus J. Lackland, and Dwight Dur-
kee, by their solicitor, A. M. Gardner, Esq., and enter their 301
appearance herein. Also come the Pacific Railroad, the
Atlantic & Pacific Railroad Company, Andrew Pierce, T. T.
Buckley, James Baker, Samuel Hays, M. J. Lippman, D. R.
Garrison, James Taussig, Oliver Hart, D. K. Furguson, T. B.
Edgar, Webb M. Samuel, by their solicitor James O. Broadhead, Esq., and enter their appearance herein for the purpose of pleading at the proper time to the jurisdiction of this court in this cause.

And afterwards, on the 6th day of December, 1875, the complainants filed the following motion, to wit.:

IN THE CIRCUIT COURT OF THE UNITED STATES, 302

For the Eastern District of Missouri.

N. A. Cowdrey, et al.
vs.
The Pacific Railroad, et al.

Eastern District of Missouri, ss.:

And now come the complainints by attorneys, and move the

303 court for leave to strike out the names of Thomas P. Akers and John S. Vogel, as complainants in the bill of complaint, and to discontinue said suit as to said Akers and Vogel.

HILL & BOWMAN,
GLOVER & SHEPLEY,
For Complainants.

And afterwards, on the 11th day of December, 1875, the following appears of record in said cause, to wit:

N. A. COWDREY, ET AL.,
Complainants,
vs.
THE PACIFIC RAILROAD, ET AL.
Defendants.

304

Now come the said parties by their said solicitors, and the motion dismissing said suit as to the complainants, John C. Vogel and Thomas P. Akers, being duly considered by the Honorable Samuel Treat, one of the judges of this court, it is ordered, that said motion be, and the same is hereby sustained.

And afterwards, on the day and year last aforesaid, the following proceedings were had before the Honorable Samuel Treat, one of the judges of this court, to wit: 305

N. A. COWDREY, ET AL.,
Complainants,
vs.
PACIFIC RAILROAD, ET AL.,
Defendants.

This day come the said parties by their respective solicitors, and the motion for a provisional injunction herein against the 306 defendants, not to transfer or dispose of certain bonds in said motion named, being submitted to the Honorable Samuel Treat, one of the judges of this court, at Chambers, and the matters and things therein being fully considered it is ordered, that the said defendants, to wit: The Pacific Railroad, the Atlantic & Pacific Railroad Company, Dwight Durkee, James Baker, Samuel Hays, M. J. Lippman, D. R. Garrison, John Tassig, Oliver Hart, D. K. Ferguson, T. B. Edgar, Rufus J. Lackland, Webb M. Samuel, Andrew Pierce and Thomas T. Buckley, and each and every one of them be, and they are hereby enjoined and restrained from transferring and disposing of, or in anywise pledging, subjecting to sale, transfer or pledge, any of the income or improvement bonds, or any of 307 eight hundred thousand dollars ($800,000) bonds, for which Lackland and Durkee are trustees, or for any of the five hundred thousand dollars ($500,000) bonds, for which Seligman and Baker are trustees, or any of the third mortgage bonds in the bill of complaint mentioned and set forth, until the further order of this court.

It is further ordered, that a temporary injunction under the seal of this court be issued, upon the plaintiff filing an injunction bond in the sum of twenty thousand dollars, with sureties to be approved by one of the judges of this court.

It is further ordered, that the motion to discharge the receivers of the custody and contract of the Pacific Railroad Company, and the same is hereby overruled.

308 And afterwards, at the September, 1875, adjourned term of said court on the 7th day of January, 1876, the following proceedings were had in said cause, to wit:

N. A. COWDREY,
Complainant,
vs.
THE PACIFIC RAILROAD, ET AL.,
Defendants.

309 Now come the said parties by their respective solicitors, and the motion heretofore filed in this cause by complainant for the appointment by the court of a separate receiver for the Pacific Railroad, being by the court heard and considered, and the court being fully advised of and concerning the same, it is ordered, that the said motion be and the same is hereby overruled, with leave to the complainant to renew the same on amendment of bill herein, or after the present lease of the said Pacific Railroad to the Atlantic & Pacific Railroad Company shall have terminated, thereupon said complainant by Messrs. Hill & Bowman, his solicitors, files his amended bill herein by leave of court.

310 Which said bill is as follows, to wit:

Bill omitted—printed copies are furnished by petitioners.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } ss.:

I, M. M. Price, clerk of the Circuit Court of the United States, in and for the Eastern District of Missouri, do hereby certify that the writing hereto attached, are true copies of the record and proceedings in the case of George E. Ketchum, *et* *al. vs.* Pacific Railroad *et al.*, except orders of direction to the receivers therein ; also the record and proceedings in the case of N. A. Cowdrey, *et al. vs.* Pacific Railroad, *et al.* ; and also the record and proceedings in the matter of the separate motions of N. A. Cowdrey and others, and Mary R. Miltenberger, for leave to intervene as fully as the same remain on file and of record in said case in my office. 311

[SEAL] In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 14th day of October, in the year of our Lord, eighteen hundred and seventy-six.

M. M. Price,
Clerk of said Court.

SUPPLEMENTAL TRANSCRIPT OF RECORD.

Supreme Court of the United States,

No. 9, Original October Term, 1876.

EX PARTE—ROBERT L. CUTTING, JR., AND OTHERS,
Petitioners,

IN THE MATTER OF
GEORGE E. KETCHUM ET AL.
vs.
PACIFIC RAILROAD ET AL.

Continuation of Record after Confirmation of Sale, viz., Oct. 6th, 1876, page 81, former Record.

Order requiring Baker to Pay and give Bonds, page 1.

Bond given by purchaser, ... 3

Deed of Master, ... 6

New York:
EVENING POST STEAM PRESSES, 208 BROADWAY, COR. FULTON ST.
1876.

UNITED STATES OF AMERICA, } ss.: 1
Eastern District of Missouri, }

IN THE CIRCUIT COURT OF THE UNITED STATES

IN AND FOR SAID DISTRICT.

Be it remembered that on the 23d day of October, A. D. 1876, at a regular stated term of the Circuit Court of the United States, in and for the Eastern District of Missouri, begun and holden at the city of St. Louis, in said district, on the 18th day of September, 1876, the following among other proceedings were had, to wit:

2

Order requiring Baker to pay $50,000, *and to give bond for* $550,000. *Made Oct.* 23*d*, 1876.

GEORGE E. KETCHUM ET AL.

vs.

THE PACIFIC RAILROAD ET AL.

In the above entitled cause, on motion of complainants, by their solicitor, James O. Broadhead, Esquire, it appearing to the court that James Baker, the purchaser of the railroad and other property heretofore ordered to be sold, represents as said purchaser, *bona fide* bondholders, as in the decree heretofore entered in this cause is specified: 3

It is ordered, that said Baker pay into the registry of this court, in cash, the sum of fifty thousand ($50,000) dollars, and execute a bond, with security to be approved by the court, in the sum of five hundred and fifty thousand ($550,000) dollars, 4 to secure the payment of such sums as may from time to time be ordered by this court in pursuance of the terms of said sale.

And thereafter, on said 23d day of October, A. D. 1876, the following further proceedings were had in said cause, as appears of record, to wit:

GEORGE E. KETCHUM ET AL.

vs.

PACIFIC RAILROAD ET AL.

5

Now again comes James O. Broadhead, Esquire, solicitor for the complainants in said cause, and James Baker, Esquire, the purchaser of the property under the decree of foreclosure heretofore made in this case; and it appearing to the court that said James Baker has paid into the registry of this court the sum of fifty thousand dollars, as heretofore ordered by this court, and also that the said Baker has delivered to Seymour D. Thompson, Esquire, master in chancery of this court, who made said sale, three thousand nine hundred and forty-eight third mortgage bonds in behalf of certain third mortgage bondholders represented by him, in part payment of the pur-
6 chase of said property under the previous decrees of this court, and the said Baker having also given and filed in this court, his bond in the sum of five hundred and fifty thousand ($550,000) dollars, with Cornelius K. Garrison, Darius R. Mangam, and Charles P. Chouteau as sureties, conditioned as required by the court; and said parties to said bond having, in open court, jointly and severally acknowledged themselves and each of them to be bound to perform each and all of the obligations of said bond as therein recited, which said bond has been approved by the court, and is in words and figures following, to wit:

Bond given by Baker, with Garrison, Mangam and Chouteau as Sureties, Oct. 23d, 1876. 7

United States of America, }
Eastern District of Missouri, } ss.:

IN THE DISTRICT COURT OF THE UNITED STATES,

In and for said District.

George E. Ketchum and als.
vs. } In Chancery. 8
The Pacific Railroad and als.

Whereas, by the judgment and decree of the Circuit Court of the United States, in and for the Eastern District of Missouri, had on the sixth day of June, A. D. 1876, in the above entitled cause Seymour D. Thompson, master in chancery, was ordered to sell the road and its appurtenances, and the franchises and other property of the said "Pacific Railroad," in said judgment mentioned, and on the terms therein specified.

And whereas, in pursuance of said judgment, decree and
order, the said road and property was, on the 6th day of Sep-
tember, A. D. 1876, sold by the said master to James Baker for 9
the sum of three millions of dollars ($3,000,000), which said
sale has been approved by this court.

And whereas, a large portion of said purchase price has been paid by said purchaser, by the delivery to said master of three thousand nine hundred and forty-eight (3,948) bonds of the issue of the so-called third mortgage bonds of the "Pacific Railroad," in accordance with the terms of said order of sale.

And whereas, by the terms of said judgment, decree and order of sale, it was provided, that in addition to the sum of two hundred thousand dollars ($200,000) therein required to be paid, and for which a bond in the last named amount has been

10 given by the purchaser, as provided therein, it was also provided that further sums of moneys should be paid by the purchaser in cash as might be required and ordered by the court.

Now, therefore, for the purpose more effectually of carrying out the object of said last named judgment, decree and order on the part of the purchaser, and of providing and securing the payment of such equitable claims as are contemplated by said order to be paid, and the payment of the *pro rata* proportion of the outstanding third mortgage bonds not delivered by the purchaser to said master, and also for the purpose of meeting and liquidating the outstanding liabilities incurred by the receivers of the said railroad and property and the costs and expenses of 11 this suit.

We, the undersigned, James Baker, as principal, and Cornelius K. Garrison, Darius Mangam and Chas. P, Choteau, as his securities, are held and firmly bound unto Seymour D. Thompson, master in chancery, in the sum of five hundred and fifty thousand dollars ($550,000) well and truly to be paid.

Conditioned : That if the said James Baker shall abide by the terms of said decree of sale, and pay such sums of money not exceeding in the aggregate the sum of five hundred and fifty thousand dollars, as may, from time to time, be awarded against him by any interlocutory or final decree or order of this court in said cause, then this obligation to be void, otherwise to remain in full force and effect. And in default of payment as aforesaid, within ten days after demand therefor, by the 12 person or persons in whose favor said order of court may be made said obligors herein hereby consent that judgment may be entered against them jointly and severally for the respective sums so ordered to be paid, and in favor of the person or persons to whom the same may be payable, and that execution may issue thereon.

In witness whereof, we hereunto severally sign our names and affix our seals this, the 23d, day of October, A. D. 1876.

JAMES BAKER, [SEAL]
C. K. GARRISON, [SEAL]
DARIUS R. MANGAM, [SEAL]
CHAS. P. CHOTEAU. [SEAL]

It is, therefore, ordered that said bond be filed among the records of the court in this case. 13

It is further ordered, that the bond for the sum of two hundred thousand ($200,000) dollars heretofore given by James Baker and others in accordance with the order of sale in this cause be and the same is hereby cancelled.

UNITED STATES OF AMERICA, } ss.:
Eastern District of Missouri, }

IN THE CIRCUIT COURT OF THE UNITED STATES,

IN AND FOR SAID DISTRICT.

14

Be it remembered, that on the 24th day of October, A. D. 1876, at a regular stated term of the Circuit Court of the United States, in and for the Eastern District of Missouri, begun and holden at the city of St. Louis in said district, on the 18th day of September, 1876, the following, among other proceedings, were had, to wit:

GEORGE E. KETCHUM ET AL.
vs.
THE PACIFIC RAILROAD ET AL.

15

Now come the complainants by their attorney, James O. Broadhead, Esq., and James Baker, Esq., and Seymour D. Thompson, Esq., master in chancery, and it appearing to the court that the property and franchises hereinafter described have been duly sold in accordance with the decree and order of the court heretofore made and rendered in this case, and that the conditions of said sale have in all respects been duly complied with by the said James Baker, the purchaser of said property, and that he is entitled to a deed thereof; and Seymour D. Thompson, Esq., the master in chancery, who made

16 said sale, having submitted to the court a deed in words and figures as follows, to wit:

Deed from Master to Baker, dated Oct. 24, 1876.

UNITED STATES OF AMERICA,

EASTERN DISTRICT OF MISSOURI.

This indenture, made in triplicate this twenty fourth day of October, A. D. 1876, by and between Seymour D. Thompson, Esquire, a master in chancery of the United States Circuit Court, for the Eastern District of Missouri, duly appointed and
17 qualified as such, party of the first part, and James Baker, Esquire, party of the second part, witnesseth:

That whereas, the Pacific Railroad, a corporation chartered and existing under and by virtue of the laws of the State of Missouri, did, on the 10th day of July, A. D. 1875, make and deliver to Henry F. Vail and James D. Fish, trustees, its mortgage or deed of trust, of that date, by which the said Pacific Railroad did convey and mortgage to the said Vail and Fish all the property, real and personal, rights, interests and franchises of the said Pacific Railroad, to secure certain bonds therein mentioned and described, as set forth in the said mortgage, and which is hereinafter more particularly described;

And whereas, George E. Ketchum, a holder of certain of the
18 bonds secured by said mortgage did on the eleventh day of November, A. D. 1875, exhibit his bill of complaint in the Circuit Court of the United States, in and for the district aforesaid, praying that the equity of redemption in and to the property, interests and franchises, embraced in said mortgage or deed of trust, be forever barred and foreclosed, and that said property, interests and franchises be sold to enforce the lien of the same, and to satisfy the debt thereby secured;

And whereas, such proceedings were had under the said bill of complaint in said court that, at an adjourned term thereof, and on the sixth day of June, A. D. 1876, a decree was entered thereunder—the name and style of the said cause being, "George E. Ketchum *et al.*, complainants, against the Pacific

Railroad *et al.*, defendants, No. 703, in equity"—that the said 19
Pacific Railroad should stand absolutely debarred and fore-
closed of and from all equity of redemption of, in and to the
said mortgaged premises, property and franchises, and that the
Pacific Railroad property, together with the franchises and ap-
purtenances of the said railway company as in said deed of
trust or mortgage, dated July 10, 1875, is described, should be
sold at public auction by the undersigned, Seymour D. Thomp-
son, master in chancery of said court, to pay and satisfy the
amounts due by said Pacific Railroad upon said bonds and any
other indebtedness weich the court might order to be paid out
of the proceeds of said sale, together with the costs of said suit
and of sale, including the services of said trustees, and their sol-
icitors' and attorneys' fees in and about the management of said 20
trust, as might thereafter be ordered by the court; and which
decree further provided that, upon said sale the said master
should execute a certificate stating, such sale and setting out
the terms and conditions thereof, and that he should report
said sale and the terms and conditions thereof immediately after
said sale to the court; and that upon the terms of such sale
being complied with, and the sale approved and confirmed by the
court, said master should be, and he was by said decree autho-
rized and directed to execute and deliver to the purchaser or
purchasers of said property a good and sufficient deed or deeds
for the same;

And whereas, it was further provided in said decree, that up-
on the sale of said road, property and franchises, the under- 21
signed, Seymour D. Thompson, master, should require the pay-
ment by the purchaser of the sum of at least two hundred
thousand dollars in cash, or the delivery to him of a good and
sufficient bond with sureties to be by him approved, for the
payment of such sum of two hundred thousand dollars, when
and as soon as thereto required by the court;

And whereas, it was further ordered and decreed, that the
terms and conditions of said sale should be the payment of said
sum of two hundred thousand dollars cash, or the execution and
delivery of the bond thereinbefore specified, on the delivery of
the certificate of sale by said master, and that the balance of
the sum bid should, unless the purchaser were a bondholder, or

22 should represent bondholder, be paid in cash at the confirmation of said sale, should said sale be confirmed; and if said purchaser should be a bondholder, or represent *bona fide* bondholders, then and in that event, should said sale be confirmed, that he should pay, or cause to be paid, in cash, said sum of two hundred thousand dollars, and also the *pro rata* portion from the proceeds of such sale, which might be by the said court then found due to the other *bona fide* bondholders; and that the balance after such cash payment might be paid in bonds, *bona fide* owned or represented by him, the court expressly reserving for future considerations all questions as to the rights, priorities and interests of all parties claiming any interest herein by way of bonds or otherwise;

23 And whereas, it was further ordered in said decree, that the undersigned, master in chancery, should designate the time of making such sale, and should advertise the same, together with a description of the property and franchises to be sold, by publication showing the time, terms and place of sale and the property and franchises to be sold, to be inserted in the *St. Louis Globe-Democrat*, published in the city of St. Louis, Missouri, in the *Evening Post*, published in the city of New York, and in the *Boston Journal*, published in the city of Boston, for the period of sixty days in each of the said newspapers, the same to be inserted in each of said newspapers once a week during the first three weeks of said period, three times a week during the second three weeks of said period, and once every secular day during the remaining portion of said period of sixty days, 24 the last insertion to be at least two weeks before the day of such sale;

And whereas, it was further ordered, adjudged and decreed in said decree, that all the premises, property and franchises covered by, and embraced in, the said mortgage sued on, viz.: the mortgage dated July 10, 1875, should be sold in a body and not separately, so that the purchaser or purchasers at said sale should acquire the whole of the property, premises and franchises embraced in said last named mortgage, subject to all prior mortgages;

And whereas, it was further ordered, adjudged and decreed in said decree, that in case said road, property and franchises should be purchased by bondholders, or by trustees for bondholders, then at any time within sixty days after said sale, any *bona fide* holder or holders of said third mortgage bonds, secured by the mortgage sued on in said cause, should be allowed to become associated with said original purchaser or purchasers, in the property purchased, in the proportion that the bonds held by him or them should bear to the whole number of bonds issued, upon the same terms and conditions, with the same rights, subject to the same burdens and under the same scheme as might be provided for or agreed upon by said original purchaser or purchasers, for the purchasing and managing the property purchased, or for creating a corporation to which said property might be conveyed—provided that at the time of his election to share in said purchase, he should pay his proportion of the money and expenses paid by the original purchaser; 25 26

And whereas, it was further ordered, adjudged and decreed that nothing in said decree contained should be construed to prejudice in any manner the claim of the county of St. Louis to a lien on the property and franchises of the said Pacific Railroad, alleged by the said county to exist, as fully appeared by the amended petition in said cause filed by the said county, for securing the payment of a certain debt of the said Pacific Railroad to said county for the sum of seven hundred thousand dollars and interest thereon, and alleged and claimed by the said county of St. Louis to be a prior lien therefor over all other incumbrances upon said property and franchises, the question of the existence and priority of said lien to be thereafter determined by the court, if not otherwise satisfactorily adjusted; 27

And whereas, it was further ordered and decreed in said decree that nothing therein contained, or proceedings had in said cause should in any manner affect the rights of the Boonville Branch Railroad, otherwise known as the Osage Valley and Southern Kansas Railroad Company, Boonville Extension, or its rights to rent therefor;

And whereas, it was further ordered, adjudged and decreed in said decree that any party purchasing under said decree should, in addition to the two hundred thousand dollars pro-

28 vided to be paid as above, pay in cash such further sum, not exceeding two hundred thousand dollars, as and when this court might require and direct to be paid, for the purpose of satisfying any statutory, equitable or other lien claims that had been or might be filed in said cause, or in the case of Calvin Littlefield *v.* The Atlantic and Pacific Railroad Company and others, pending in said court, and which had been, or might thereafter be directed by the court to be paid by the receivers or either of said companies, and which, on a hearing and final accounting had between the receivers of the said Atlantic and Pacific Railroad Company and the receivers of the Pacific Railroad, in respect to said liens and payments, might be found to be due and owing to the receivers of the said Atlantic and Pacific Railroad Company;

29 And whereas, I, the undersigned, master in chancery, did, in pursuance of the terms of said decree, designate Wednesday, the sixth day of September, A. D. 1876, between the hours of eight o'clock, A. M. and four o'clock P. M. as the time of making such sale, and did advertise the same, together with a description of the property and franchises to be sold, by publication, showing the time, terms and place of sale, and the property and franchises to be sold, which advertisement was inserted in the *St. Louis Globe-Democrat*, published in the city of St. Louis, Missouri, in the *Evening Post*, published in the city of New York, and in the *Boston Journal*, published in the city of Boston, for the period of sixty days, in each of said newspapers beginning on Thursday, the twenty-second day of June, A. D.

30 1876, and ending on Tuesday, the twenty-second day of August, A. D. 1876, the said advertisement having been inserted in each of said papers once a week during the first three weeks of said period, three times a week during the second three weeks of said period, and once every secular day during the remaining portion of said period of sixty days, the last insertion having been at least two weeks before the day of such sale;

And whereas, proof of publication of the said advertisement, as required by said decree, was duly made and lodged with the undersigned, in conformity to the statute of the State of Missouri, in such cases made and provided, which proof was duly filed by the undersigned, master in chancery among the papers in said cause in the office of the clerk of said court, as an exhibit to his report of said sale, as hereinafter named; 31

And whereas, I, the undersigned, master in chancery, did on the sixth day of September, A. D. 1876, at the hour of twelve o'clock meridian, at the east door of the Court House in the city of St. Louis, Missouri, after reading to the persons there assembled, a duly certified copy of the decree aforesaid, and also a copy of the said advertisement, expose to sale at public auction, in a body not separately, and subject to all prior liens and mortgages, as provided for in said decree, all the property, rights, interests and franchises of the said Pacific Railroad [of Missouri] described in the said mortgage or deed of trust, dated July 10, 1875, made by said Pacific Railroad to Henry F. Vail and James D. Fish, trustees, and hereinafter more particularly described; 32

And whereas, James Baker, the party of the second part herein named, did then and there bid for the said property, franchises and estate, subject to all prior liens and mortgages, as provided in said decree, and subject also to all the terms, limitations and conditions named in said decree, the sum of three million dollars ($3,000,000), and he being the highest and best bidder, and no other person, after full and fair notice given, being willing to offer any advance upon said bid, the said property, franchises and estate were then and there sold to him, the said James Baker, subject to all prior liens and mortgages, as provided in said decree, and subject also to all the terms, limitations and conditions named in said decree and hereinbefore set forth: 33

And whereas, the said James Baker did thereupon sign an acknowledgment of the fact and amount of his said bid, and did then and there execute and deliver to the undersigned, master in chancery, a bond to secure the payment of the sum of two hundred thousand dollars, as provided for in the said decree, and the said James Baker and the sureties whose names appear on said bond, did acknowledge their signatures and seals, to the same in the presence of the undersigned, and the said bond was by the undersigned found to be a good and sufficient bond to secure the sum in question, and was therefore approved by the undersigned;

34 And whereas, afterwards, to wit, on the 15th day of September, A. D. 1876, I, the undersigned, master in chancery, did lodge, in the office of the clerk of said court, my report of said sale, addressed to the judges of the said court, and setting forth fully my doings under the said decree;

And whereas, afterwards, to wit, on the seventh day of October, A. D. 1876, a decree was entered in the said cause, reciting that the said sale was in all respects regular and in accordance with the terms and requirements of said decree and ordering that the same be confirmed;

And whereas, the said James Baker, party of the second part, did on the 20th day of October, A. D. 1876, deliver to the undersigned in part payment of his said purchase three thousand nine hundred and forty-eight (3,948) bonds of the Pacific 35 Railroad, known as third mortgage bonds for the payment of one thousand dollars ($1,000) each, dated July 10th, 1875, signed by Samuel Hays, president of the Pacific Railroad, and countersigned by J. L. Dearborn, treasurer of the said corporation, and sealed with their corporate seal; and did on the 23d day of October, A. D. 1876, pay into the registry of the court, the sum of fifty thousand dollars ($50,000) in cash, and did on the same day enter into a bond with sureties then and there by the court approved, to pay such further sum not exceeding five hundred and fifty thousand dollars ($550,000) whenever required by the court, and in such instalments as the court should require;

36 And whereas, such payments of bonds and of money and the giving of such bond were accepted by the court as a compliance on the part of the said James Baker, party of the second part, with the terms and conditions of said sale, it having been adjudged by the court that he purchased the said property, franchises and estate as the representative of *bona fide* bondholders;

And whereas, on the twenty-third day of October, A. D. 1876, an order was entered in said cause requiring the undersigned, master in chancery, to make and deliver to the said James Baker, party of the second part, this deed of conveyance of the property, franchises and estate, embraced in said mortgage, decree and sale, the court having first approved said deed in substance and in form;

Now, therefore, in consideration of the premises and by virtue of the powers vested in me by my said office of master in chancery of said court, and by the decrees and orders aforesaid, and in obedience to the said decrees and orders, and in order to give effect to the same, I, the said party of the first part, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said James Baker, party of the second part, his heirs and assigns forever, subject to the terms, limitations and restrictions enumerated in said decree, of June sixth, 1876, all the right, title, interest and estate of the Pacific Railroad, in and to the property and franchises embraced in the deed of mortgage, bearing date of July the tenth, A. D. 1875, as aforesaid, and also as described in said decree of foreclosure and sale and in the advertisements of said sale as aforesaid, as follows, that is to say: 37 38

1. All and singular the entire line of the Pacific Railroad (of Missouri), two hundred and eighty-three miles in length, extending from the depot at Seventh street, in the city of St. Louis, State of Missouri, to the western boundary of said State, at Kansas city, and passing through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Monitau, Morgan, Cooper, Pettis, Johnson, Cass, and Jackson, in said State of Missouri, with its appurtenances, including, among other things, the track on Poplar street and the Levee, in the city of St. Louis, commonly known as "the Poplar street track," and including the real estate, depots, stations, machine-shops, rolling-stock, machinery, rights and interests and franchises of the said railroad company, subject to the liens of the two mortgages described in the said bill of complaint, severally executed by said Pacific Railroad, one of which was so executed to Murdock, Punnett and Clark, and the other of which was executed to Edwin D. Morgan and Joseph Seligman. 39

2. All and singular the following described real estate in the city of St. Louis, State of Missouri, viz: Four blocks of ground in the city of St. Louis, being city blocks numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerre street, west by

40 Eleventh street, and north by Poplar street. Also, block number two hundred and thirteen, of the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street—saving and excepting therefrom lots 26, 29, 33 and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block, sixty-six feet eight inches on Fourteenth street, by one hundred feet on Austin street.

Also, the following described real estate in city block number four hundred and thirty-eight, viz:

Beginning at the northwest corner of Eleventh and Cerre
streets, in the city of St. Louis, the southeast corner of said
41 block; thence west along the north side of Cerre street one
hundred and fifty-two feet and six inches, more or less, to an
alley; thence north one hundred feet; thence east, parallel to
Cerre street, one hundred and fifty-two feet and six inches, to
Eleventh street; thence southerly on the line of Eleventh
street, to the place of beginning.

Also the following, viz: Commencing at the southwest corner of city block number four hundred and thirty-eight, the north east corner of Twelfth and Cerre streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerre street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

42 And also the following described tract or parcel of land, viz: Commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth and Cerre streets; thence south one hundred and seventy-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly, along said south line, to the northeast corner of said block four hundred and thirty-nine; thence along the south line of Cerre street to the place of beginning; being the same property mentioned and described in said bill of complaint as covered by the mortgage executed to Lackland and Durkee, and said premises being conveyed subject to the lien of said last mentioned mortgage.

3. All and singular the branch railroad of the said Pacific Railroad, constructed and operated, and extending from a point on the main line at or near Kirkwood, thence to the termination of the said railroad at the Mississippi river at Carondelet or South St. Louis, with its appurtenances, including the depots, stations, machine-shops, superstructures and erections on the line of said branch railroad, or at Carondelet aforesaid, together with all the side-tracks and switches connected with said branch railroad, and also all the lands acquired and appropriated, or that may be acquired or appropriated, for depots, engine-houses, car-houses, station-houses, warehouses, machine-shops, or other superstructures and erections on the line of said branch railroad, or at Carondelet aforesaid; which said last mentioned premises and property were so mortgaged, subject to the lien of a mortgage to Jesse Seligman and James Baker, described in the bill of complaint. 43 44

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all the reversions, remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever, either in law or in equity, of the said Pacific Railroad, and of the said Vail and Fish, trustees, in and to the above described premises, and their hereditaments and appurtenances, which the undersigned is, by virtue of the various decrees and orders hereinbefore enumerated, entitled to convey. 45

To have and to hold the same unto the said James Baker, party of the second part, his heirs and assigns, to his and their only proper use and benefit forever.

In witness whereof, the party of the first part, as master in chancery of said court, has hereunto set his hand and seal the day and year first above written.

[SEAL.] SEYMOUR D. THOMPSON,
Master in Chancery of said Court.

And it further appearing to the court that the said deed is correct in form and substance, and that all the recitals in said

46 deed contained are true and correct; Now, therefore, it is ordered and decreed that the said Seymour D. Thompson, master in chancery, do execute, acknowledge and deliver to the said James Baker a deed in duplicate, in tenor and form as submitted to the court and hereinbefore set forth, of the said property and franchises, and upon the delivery of said deed the receiver heretofore appointed by the court in this case are authorized and directed to turn over said property to the said Baker, or his assigns, taking a proper inventory thereof and a receipt therefor.

And afterwards, to wit, on the 25th day of October, of said Term, the following appears of record in said cause, to wit:

47 GEORGE E. KETCHUM ET AL.
vs.
PACIFIC RAILROAD ET AL.

Be it remembered, that on this 25th day of October, A.D. 1876, appears in open court Seymour D. Thompson, Esquire, master in chancery of this court, and acknowledges that he execute and delivers the deed filed in this cause on the 24th day of October, A. D. 1876, to the grantee therein named, under the orders of this court hereinbefore recited, and for the uses and purposes in said deed and in said orders named.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } ss.:

48 I, M. M. Price, clerk of the Circuit Court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto annexed contains true and perfect copies of orders made in the case of George E. Ketchum *et al. vs.* The Pacific Railroad *et al.*, on the 23d, 24th and 25th days of October, A. D. 1876; and also that the copies of the bond and deed embraced in said copies of orders are true and perfect, as fully as the same remain on file of record in said case, in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office
[SEAL.] in the city of St. Louis, in said district, this

25th day of October, in the year of our Lord eighteen hundred and seventy-six. 49

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy.

(Endorsed)—No. 703—United States Circuit Court, Eastern District of Missouri—Geo. E. Ketchum *et al.* *against* The Pacific Railroad *et al.*—Duly certified copy of orders of 23d and 24th days of October, A.D. 1876, in the above entitled cause.

1 Supreme Court of the United States, October term, 1876.

Ex parte Robert S. Cutting, Jr., Peter Marie, Frank A. Otis, Jacob Cromwell, George L. Kingsland, George R. Fearing, and N. A Cowdry, petitioners. } No. 9. Original.

In the matter of George E. Ketchum et al, complainants,
vs.
The Pacific Railroad Co. et al. } Petition for mandamus.

Now, on the 27th day of October, A. D. 1876, on the application of
H. Crawford, counsel for the petitioners, for a rule on the judges of the
circuit court of the United States for the eastern district of Missouri,
to show cause, if any they have, why a writ of mandamus should not
issue commanding them to grant the prayer of said petitioners for an
appeal in said cause, it is ordered that their petition be placed on file,
together with the transcript of record accompanying the same,
2 and a rule is directed to go, returnable on 20th day of November,
A. D. 1876, to the said judges of the circuit court of the United
States for the eastern district of Missouri, commanding them to show
cause, if any they have, why a writ of mandamus shall not issue as prayed
in said petition.

Answer and return.

The respondents, John F. Dillon and Samuel Treat, judges of the circuit court of the United States for the eastern district of Missouri, for answer and return to the foregoing order to show cause, if any they have, why a writ of mandamus, as prayed for, should not issue, respectfully state and for cause show the following facts, to wit:

The circuit court of the United States for the eastern district of
Missouri, having before it at its March term, 1876, for consideration
the various matters in the suit of Ketchum et al. v. The Pacific Railroad
Company et al., postponed the consideration thereof to the
3 adjourned term, ordered to be held on the 5th day of June following.

On the 6th day of June of said adjourned term, by consent of all the parties thereto remaining of record in said cause, a decree of foreclosure and order of sale were entered.

The petitioners before the Supreme Court of the United States were then no parties to said cause. Said adjourned session of said March term was open, and in active discharge of business pending before it, until the 24th day of June, at which time it adjourned sine die.

The original bill of foreclosure was filed November 11th, 1875, by said
George E. Ketchum, on his own behalf, and on behalf of all others holding
third-mortgage bonds against the Pacific Railroad, a corporation
created under and by virtue of the laws of the State of Missouri, and
against the Atlantic and Pacific Railroad Company, a corporation created
and organized under and by virtue of an act of the Congress of
the United States approved July 27th, 1866, and at the several
4 times thereinafter mentioned engaged in operating and maintaining
a railroad in the State of Missouri, and against James Baker,
Rufus J. Lackland, and Dwight Durkee, citizens of the State of Missouri,
and Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D.

Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, citizens of the State of New York.

On January 8th, 1876, T. P. Akers, purporting to be a stockholder of said Pacific Railroad, filed his motion for leave to answer, and on February 7th, by leave, filed his answer and cross-bill.

On March 10th, said Akers filed a motion to withdraw his said answer and cross-bill, which, on April 3d of said year, was granted. On said 3d day of April leave was given to said St. Louis County to file a separate answer, and to said Akers to file a new cross-bill, and for said county to join in said cross-bill.

On April 25th, said Akers filed his answer and cross bill, and also said St. Louis County.

5 On June 5th, said Durkee and Lackland, Murdock, Clark, Morgan, Joseph Seligman, Baker, and Jesse Seligman, also the Atlantic & Pacific Railroad Company, filed their answers.

On June 6th, 1876, Fish and Vail answered, and on the same day said Akers and said St. Louis County withdrew their answers and dismissed their cross-bills; both said Akers and said St. Louis County purporting to act for themselves as stockholders and for all other stockholders who might join with them.

Thereupon all parties of record, being duly represented in court, consented to the decree of foreclosure and sale of the date June 6th, 1876.

On September 18th, to wit, the first day of the regular September term of said circuit court, a motion was filed to confirm the sale previously made by the master under the decree of June 6th, 1876, a report of which had been filed on September 15th, preceding.

On September 19th, said petitioners before the Supreme Court of the United States filed in the said circuit court a motion for leave to
6 intervene, as also did Mary R. Miltenberger, claiming to be a stockholder of said Pacific Railroad.

On September 22d, said petitioners filed an additional motion to intervene.

On the third day of October, said several motions to intervene were denied on two grounds, to wit:

First. That the decree of June 6th, 1876, was a final decree, and, having been rendered at a prior term of the court, it was beyond the power of the same court to set it aside or change or modify it.

Second. Were this otherwise, the petitioners were guilty of laches, which should deprive them at that late day of any supposed right to intervene in order to contest the original merits of the plaintiffs' right for a foreclosure as decreed at the preceding term.

This was the more apparent from the fact that Cowdry, one of the petitioners, also T. P. Akers and Vogel, for themselves and such stockholders as might join, had on the 13th day of November, 1875, filed in said circuit court an original bill to invalidate the mortgage sought to be foreclosed in said suit by said Ketchum et al.

7 After appearance to said bill of Cowdry and others, and before answers thereto, the same was dismissed as to said Akers and Vogel on December 11th, 1875, on their motion.

On January 7th, 1876, said Cowdry filed an amended bill, to which answers were filed by some of the defendants on February 5th, 1876.

On February 7th, 1876, a second amended bill was filed by said Cowdry. To said second amended bill answers were filed by some of the defendants and demurrers by other defendants, on February 7th, March 11th, March 20th, and, by leave, on September 13th.

No motions or other proceedings were ever had on said bill of Cowdry, nor any matters therein set down for hearing, or testimony taken.

It was thus apparent to said circuit court that said Cowdry, for himself and other stockholders who might have joined in said bill, had taken no proper steps to advance the same for hearing, or for the consideration of any matters therein involved, with the required diligence.

It also appears that said Akers and St. Louis County, in said bill of
Ketchum et al. v. The Pacific Railroad et al., had, on behalf of
8 themselves and such other stockholders as might join therein,
answered, and filed cross-bills for the same purpose as said
Cowdry had filed his original and amended bills.

This said Cowdry, and all other stockholders who might join with him, were in court during all the proceedings of the term, when the decree of foreclosure and sale was entered, and had had the fullest opportunity to intervene by joining in the answers and cross-bills filed by said Akers and said St. Louis County, and otherwise.

Still, neither he nor any one of the petitioners herein objected to or in any manner interposed against the said consent-decree of June 6th, 1876.

The first motions made by them with reference thereto were at the following term of the said circuit court, as heretofore stated, to wit, on September 19th, for leave to intervene and become parties to said original suit of Ketchum et al. All of the said facts are, as your respondents are informed and verily believe, wholly apparent from the transcript of the record of the said circuit court now on file in said Supreme Court.

And your respondents, for further answer and return, state that
thereafter, on the 21st day of October, 1876, a bill of review was
9 filed in said circuit court as follows, to wit:

Circuit court of the United States, in and for the eighth judicial circuit
and eastern district of Missouri.

To the honorable the judges of the circuit court of the United States,
for the eighth judicial circuit and eastern district of Missouri:

Alexander Reitlinger, of the city of New York, and a citizen of the State of New York, suing on behalf of himself and all others in like interest in the Pacific Railroad Company, who may hereafter come in and contribute to the expenses of this action, brings this his bill against Cornelius K. Garrison, George E. Ketchum, James Seligman, Jesse Seligman, Edwin D. Morgan, Henry F. Vail, Joseph Seligman, James D. Fish, Uriel A. Murdock, and Luther C. Clark, residents of the city of New York, and citizens of the State of New York, and against the Pacific Railroad Company, a body politic and corporate, incorporated in the State of Missouri, under and by virtue of an act of the legislature of
said State approved   , 1848, and a citizen of the
10 State of Missouri, and against the Atlantic and Pacific Railroad
Company, a body politic and corporate, created by an act of the
Congress of the United States approved July 27th, 1866, and entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," and by the aforesaid act of Congress authorized and empowered to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and against James Baker, Rufus J. Lackland, Dwight Durkee, and Thomas P. Akers, residents of the city of St. Louis, and citizens of the State of Mis-

souri, and Thomas W. Pierce, of Boston, and a citizen of the State of Massachusetts, and against the County of St. Louis, a body politic and corporate, incorporated under and by virtue of the laws of the State of Missouri, and a citizen of the State of Missouri.

And thereupon your orator complains and says, that on or about the 3d day of November, 1875, George E. Ketchum, the defendant above named, exhibited his bill of complaint in this honorable court against the Pacific Railroad Company, Jesse Seligman, Uriel A. Murdock, Luther C. Clark, Henry F. Vail, James D. Fish, Rufus J.
11 Lackland, Dwight Durkee, and James Baker, all defendants
above named, and in and by said bill the said George E. Ketchum set forth as follows:

(And said bill of review then recited in full the said original bill of Ketchum et al., as the same appears in the transcript of record on file in this cause in the said Supreme Court.)

And the said bill of review, after the recital of said bill of Ketchum et al., was in words and figures as follows, to wit:

That in and by certain orders made in said cause and certain amendments made to the said bill, copies of which are hereto annexed as exhibits forming a part of this bill, and as appears by the decree in said cause hereinafter set forth, the said Cornelius K. Garrison, James Seligman, and Thomas W. Pierce became co-complainants in said suit, and the aforesaid Thomas P. Akers and the County of St. Louis became codefendants in said suit, as appears by certain orders and amendments made in said suit, by their answers and cross-bills therein, all of which are hereto annexed as exhibits, complainant prays may be taken as a part of this bill.

That the aforesaid defendants, Pacific Railroad Company, James D. Fish, Henry F. Vail, James Baker, Rufus J. Lackland, Dwight
12 Durkee, Jesse Seligman, Uriel A. Murdock, appeared and put in
such answers to the aforesaid bill as admitted the allegations of the said bill, but neither they nor any of them set up any plea, demurrer, or any other traverse, or any other contestation whatever to or concerning the said bill. The defendants Thomas P. Akers and the County of St. Louis set up certain answers and cross-bills to the said bill, but the said answers were thereafter withdrawn and the said cross-bills dismissed by the said Thomas P. Akers and the County of St. Louis. Copies of the aforesaid answers and cross-bills set up by all of the defendants in the said bill are hereto annexed as exhibits, and your orator prays that the same may be taken as a part of this bill, with the same force and effect as if the same were fully and at length set out in the body of this bill.

That thereafter, and upon the above-recited bill, and upon the answers above referred to, except the answers and cross-bills of Thomas P. Akers and of the County of St. Louis, which were withdrawn, and upon the exhibits in the above-described suit, the said cause came on to be
13 heard before your honors, and no opposition being made by any
of the aforesaid parties to the proceedings hereinbefore set forth, a decree therein was pronounced, passed, entered, and enrolled on the 6th day of June, 1876.

The said decree reads as follows:

(The said bill of review then recited in full the said original decree in said case of George E. Ketchum et al. v. Pacific Railroad et al., as the same now appears in the transcript of record on file in this cause in the said Supreme Court.)

And the said bill of review, after the recital of said decree, was in words and figures as follows, to wit:

And thereupon your orator further shows that the aforesaid decree is erroneous and ought to be reversed and set aside, for many apparent errors and imperfections as hereinafter set forth.

Your orator is the owner of five hundred shares of the capital stock of the Pacific Railroad Company above named, one of the defendants in the aforesaid suit, in which the above-recited decree was obtained, and the said Pacific Railroad Company is the mortgagor named in the mortgage on which said decree was obtained. The complainant in
14 this suit is a member of the said corporation, and his shares aforesaid stand in his name on the books of the said Pacific Railroad Company.

Your orator acquired said shares for investment on October 18th, 1875, and paid therefor at the rate of thirty-seven and one-half dollars per share, and the sum of ($18,750) eighteen thousand seven hundred and fifty dollars for the total amount of said shares. By reason of the said decree of foreclosure and sale, your orator's interests in the said Pacific Railroad Company have been greatly injured, and unless the said decree be set aside and reversed, your orator's property and interest as a member of the said corporation and an owner in the said shares therein, and interested in the railroad and property thereof, will be totally destroyed. Your orator is in fact greatly aggrieved by the said decree, and the directors of the said Pacific Railroad Company have utterly failed and refused to take any proceedings to have the said decree reviewed, reversed, or set aside, though they have thereunto been duly requested. The defendant Baker attempted to purchase said railroad and property at the aforesaid sale.

15 And your orator avers and says that the aforesaid decree contains apparent error and imperfections, inasmuch as it appears by the bill of complaint in the said suit in which the said decree was obtained, as follows:

That the complainant in said bill, George E. Ketchum, is named in and by said bill, as well as certain of the co-complainants in said bill, to be and as citizens of the State of New York, and certain of the defendants in said bill, Jesse Seligman, Edwin D. Morgan, Joseph Seligman, Henry F. Vail, and James D. Fish, are likewise named in said bill to be and as citizens of the State of New York. The said Henry F. Vail and James D. Fish are made defendants in said bill, as trustees of the mortgage under which the complainants claim title, and pray foreclosure.

This court never had any jurisdiction, right, or lawful power in said suit to proceed therein upon or over the property of the Pacific Railroad Company, and this court never had any authority or warrant of law for granting any order or decree in the suit aforesaid, but the said bill ought to have been dismissed for the reasons aforesaid.

16 That your orator is totally remediless to enforce the said claims at law and without the intervention and process of a court of equity.

In consideration whereof, and inasmuch as such errors and imperfections, namely, the absence of jurisdiction in the court, appear in the body of the said decree, and in the bill on which the same is founded, the complainant hopes that the said decree will be reversed and set aside, and no further proceedings had therein.

To the end, therefore, that your orator and the other parties in like interest in the Pacific Railroad Company may be relieved from the said erroneous and unlawful decree, whereby it is sought to deprive them of their rights and property in and to the said railroad, and that for the reasons and under the circumstances aforesaid, the said decree may be reviewed, reversed, and set aside, and no further proceedings taken therein, and the said railroad and all the property of the said Pacific Railroad Company and the said corporation be relieved from the decree in the said suit and all the proceedings therein,

17 May it please your honors to grant your orators process of subpœna against Cornelius K. Garrison, George E. Ketchum, James Seligman, Thomas W. Pierce, Pacific Railroad Company, Atlantic & Pacific Railroad Company, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Edwin D. Morgan, Uriel A. Murdock, Joseph Seligman, Luther C. Clark, Henry F. Vail, James D. Fish, Thomas P. Akers, County of St. Louis, commanding all and each of them to appear and answer this your orator's bill.

And as to such of the defendants who may be out of the jurisdiction of the court, your orator prays that process may be issued to make them parties and compel them to appear and answer this bill if they come within such jurisdiction, or that if they should not come within such jurisdiction, such proceedings may be had in regard to such defendants as may be according to the forms of proceedings in equity and of the statutes in such cases made and provided.

And your orator prays your honors to make such interlocutory and final orders and orders of injunction and decrees as may be re-
18 quisite to prevent any further action or proceedings under the said unlawful and erroneous decree which may be injurious or adverse to the rights and interests of your orator and the other parties in like interest in the said Pacific Railroad Company.

And your orator likewise prays that the aforesaid decree and all proceedings thereon may be reviewed and reversed, and the bill in said suit wherein said decree was obtained be dismissed and all proceedings be set aside and held for naught.

And on the final hearing and pendente lite may it please your honors to grant your orator such other and further relief as may be equitable in the premises.

And your orators will ever pray, &c., &c.

ALEXANDER REITLINGER.

EDWARD L. ANDREWS,
Solicitor & of Counsel for Complainant.
With HENDERSON & SHIELDS,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
Southern District of New York:

Alexander Reitlinger, being duly , deposes and says that he is the complainant named in the above bill, and a stockholder
19 of the Pacific Railroad Company as therein alleged; that he has read the foregoing bill and knows the contents thereof; that the said bill is true of his own knowledge, except as to the matters therein stated on information and belief, and as to said matters he believes them to be true.

ALEXANDER REITLINGER.

Sworn to before me this 17th day of October, 1876.

MATTHEW DALY,
Notary Public, State, City, & County of New York,
Acting as United States Commissioner.

Humbly suggesting, that if said transcript doth not set out all the facts and circumstances named, or such as may be necessary for a full investigation of the questions in this case, pending before said Supreme Court, the respondents are at all times ready and willing to make a further and more detailed return of the records of said circuit court. They respectfully submit, that for the causes stated the writ of mandamus prayed for ought not to issue, because:

First. It was not within the power of the said circuit court,
20 or the judges thereof, at the term subsequent to that in which the final decree was rendered, to set the same aside, modify, or in any manner change the same at the instance of the original parties to the suit, and far less at the instance of persons who were not parties, and who had not availed themselves of ample opportunities to become parties if they so desired.

Second. If said circuit court had power in the exercise of its legal discretion to permit at the dates named the petitioners to become parties in the said suit of Ketchum et al., it ought not to have so done under the facts and circumstances stated, said petitioners not having appeared in due time, or offered, by way of indemnity or otherwise, to make good the costs and expenses which had been previously incurred or which might follow from their intervention provided they should fail in causing said decree of June 6th, 1876, to be set aside, and the proceedings had thereunder, and the third mortgage and the bonds
21 secured thereby in the hands of the then holders to be decreed to be void.

Your respondents, therefore, repectfully submit, that as said petitioners were not parties in said suit of Ketchum et al., and ought not in law or justice to have been permitted to intervene therein, under the circumstances named, the writ of mandamus prayed for ought to be denied.

All of which is respectfully submitted for the judgment of the Supreme Court of the United States in the premises.

(Signed) JOHN F. DILLON,
(") SAMUEL TREAT,
Judges of the Circuit Court of the United States
for the Eastern District of Missouri.

Filed 20th November, 1876.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1876.

Exparte ROBERT L. CUTTING JR. AND OTHERS, *Petitioners*,

against

THE JUDGES OF THE CIRCUIT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT
OF MISSOURI

PETITION FOR MANDAMUS.

STATEMENT AND ARGUMENT FOR PETITIONERS.

HENRY CRAWFORD, SOLICITOR.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
1876.

SUPREME COURT OF THE UNITED STATES,

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THE JUDGES OF THE CIRCUIT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT
OF MISSOURI.

PETITION FOR MANDAMUS.

STATEMENT OF FACTS.

I.

The litigation on which the petition for mandamus is based, is this:

Nature of the property involved.

The Pacific Railroad, the principal defendant in the cause, is a Missouri corporation, owning the most important line of railway in that State, running from St. Louis to Kansas City, about 283 miles in length.

Its capital stock is limited by its charter to $10,000,000, about $6,500,000 has been issued.

For several years, its earnings, gross and net, have been as follows:

1869,	Gross,	$3,213,000.	Net,	$ 973,000.
1870,	“	3,500,000.	“	945,000.
1871,	“	3,598,000.	“	946,800.
1872,	“	3,606,000.	“	no report.
1873,	“	3,708,000.	“	1,402,715.
1874,	“	3,713,000.	“	1,451,889.
1875,	“	3,200,000.	“	no report.

Prior to June 29, 1872, the bonded debt of the corporation, secured by mortgage, was as follows:

First mortgage	bonds	$7,000,000.
Second “	“	2,804,000.
Real Estate	“	800,000.

Besides these sums, the county of St. Louis had loaned its credit to amount of $700,000, making a total lien indebtedness of $11,304,000, upon which the corporation was liable to pay an annual interest charge of about $800,000.

The further statement that the company owed no floating debt whatever, in excess of the above sums, stands wholly uncontradicted.

Terms of lease to A. and P. R. R.

On June 29, 1872, the Atlantic and Pacific Railroad Company, (a corporation organized under an Act of Congress,) leased the entire line of the Pacific Railroad, practically in perpetuity. The lease appears in the record. By its covenants, the Atlantic and Pacific Railroad Company bound itself, “at its own cost, risk and expense, to maintain, preserve and keep the aforesaid railroad in good working condition and repair as first-class railroads,” &c.

And also to pay all taxes and assessments imposed or levied on the railroad or business, “all expenses for operating, constructing, repairs, salaries, or otherwise, which may be necessarily incurred on account of the railroad and demised premises."

And it further provided that the lessee might, "from time to time, *at its own expense*, make such *alterations*, *improvements* and *additions* in, upon or to the property hereby demised, as may be proper for its full enjoyment for railroad purposes."

And it was further agreed therein that, "the lessee should assume, pay and perform all the contracts, debts, obligations and liabilities theretofore made or incurred by or imposed on the lessor."

The Atlantic and Pacific Railroad Company covenanted during the lease, to punctually pay all the interest accruing on the bonded debt of the Pacific Railroad, and keep up the sinking funds, and also pay dividends on the capital stock of the Pacific Railroad, payable quarter yearly. These dividends were declared due and payable directly to the individual shareholder, without the intervention of the lessor company.

Under the provisions of this lease the Atlantic and Pacific Railroad Company entered, very shortly after its date, into the possession and use of the premises and continuously since that time the Pacific Railroad has never been in the custody of its corporate property, or the enjoyment of any portion of the income derived therefrom.

It is to be specially noted that the corporation has never up to the present hour been in default on any of the mortgage obligations which were in existence when the custody and corporate management of its corporate property left its hands. Even during the receivership incident to this litigation all coupon and sinking fund payments have been promptly met.

It appears that the means whereby this lease was effected, was through the purchase by the main owners and officers of the Atlantic and Pacific Railroad Company of a majority of the capital stock of the Pacific Railroad, for the express and avowed purpose of ordering and concluding a lease of the Pacific Railroad, and thus enable them to completely control its affairs.

Creation of additional debt by lessee.

The statements in the stockholders' defense that the Pacific Railroad owed no floating debt, and that its revenues have always been amply sufficient to pay all operating and improvement expenditures, interest on its lien debt, and the agreed dividends on stock, remain wholly undisputed. (Record, pp. 56, 57.)

Notwithstanding all this, it appears that the Atlantic and Pacific Railroad Company demanded of its then directors, in August, 1872, that the Pacific Railroad should deliver to it $1,500,000 of bonds. This was done. *These so-called income bonds were not secured by any mortgage upon the road.* (Record, p. 16.)

A similar demand was made in December 11, 1874, for a second issue of Pacific bonds, to amount of $2,000,000, called improvement bonds, and the Atlantic and Pacific took them. *This issue was not secured by any mortgage.* (Record, p. 16.)

Both these issues falsely and fraudulently recited upon their face that they were for "the payment of the floating debt of the Pacific Railroad, and the improvement of its property." (Record, pp. 57, 58.)

The "income trust" ran to A. V. Stout and T. B. Edgar, trustees, the first of whom was a director in the Atlantic and Pacific and the latter a director of the Pacific. The trust for the "improvements" ran to Henry F. Vail and James D. Fish, the latter being a director in the Atlantic and Pacific Railroad.

On July 10, 1875, none of the $2,000,000, so called improvement bonds had been sold, but the Atlantic and Pacific Railroad Company had made use of them by depositing them as collateral security on certain loans of its own and individual debts of the directors, at rates varying from 30 to 50 cents on the dollar. (Record, p. 58.)

Among those who thus held such bonds of the Pacific Railroad, as collateral to the paper of the Atlantic and Pacific, were the following directors of the last named company, viz.: Joseph Seligman, James D. Fish, George F. Stone, D. R. Garrison, Clinton B. Fisk, Andrew Pierce, Cornelius J. Bergen, T. T. Buckley, and the National Bank of Commerce in New York (of which Henry F. Vail is cashier).

Issue of $4,000,000, *so-called, third mortgage bonds, July* 10, 1875.

On July 10, 1875, the directors of the Pacific Railroad directed the issue of $4,000,000 bonds, *to be secured by a mortgage on the entire line of the Pacific Railroad.* To be issued for the purpose of "calling in and retiring the income and improvement bonds, and borrowing money for the future permanent improvement of the road."

This mortgage was executed to Vail and Fish, the latter a director of Atlantic and Pacific, and both interested heavily in the Atlantic and Pacific loans with "improvement bonds" as collateral.

The only authority under the laws of Missouri for a corporation to issue bonds and execute a mortgage on its road is for "the purpose of borrowing such sums of money as may be necessary for the completion, equipment and repair of its road and to fund its floating debt."

1 Wagner's Stat.. 315.

It is further required by the laws of that State, that no issue of bonds shall be valid without the vote and ratification of the stockholders.

Ibid.

The lease provided—

"That the *Atlantic & Pacific Railroad Co. shall have the right to borrow such sums of money*, at such rates of interest and payable at such times as it shall deem proper, for the purpose of improving the said demised and leased premises and increasing their usefulness, and for the purpose of paying the indebtedness of the said Pacific Railroad herein specified and hereby assumed by the said party of the second part; and for the purpose of securing the payment of the money so borrowed the said Atlantic & Pacific Railroad Co. shall have the right, and is hereby vested with full power and authority to mortgage its leasehold estate and term."

The mortgage to Fish & Vail substantially recites this lease and its terms and that the mortgage is executed for the precise purpose for which the Atlantic & Pacific Railroad was to borrow money on its own credit and mortgage its own leasehold estate and term; and that the bonds of the Pacific Railroad were to be delivered to and used by the Atlantic & Pacific Railroad, in effect as a loan of its credit.

No mortgage authorized by stockholders' vote.

The circular transmitted to the shareholders, asking assent to the issue of the $4,000,000 bonds, carefully concealed all mention of *any mortgage being contemplated*, and it is charged in the answer that the proxies were procured by these same directors by willful and fraudulent concealment of the accounts, and solely to aid them in a corrupt scheme to acquire the property of the corporation of which they were trustees. (Record, pp. 60, 61.)

The proxies prepared for signature did not specify or authorize any vote upon the execution of such a mortgage.

Solely on the authority of a vote under such proxies, a mortgage was directed to be issued on July 10, 1875. It is called the third mortgage.

It was executed on the same day. The bonds secured by it *were dated back to May* 1, 1875, so as to make the first coupon mature November 1, 1875.

Disposition of bonds among the directors and associates.

The stockholders' defense charged unequivocally that this bonded issue of $4,000,000 was wholly without consideration; that the Pacific Railroad received no avails thereof; (Record, p. 64); that its own legitimate revenues were ample to pay all operating expenses, improvement, interest and dividends; that the issue was contrary to the covenants of the lease; that the officers of the company being either the same, or under the control of the Atlantic & Pacific R. R. Co. combined together to acquire the property of the corporation by the device of manufacturing these bonds and this mortgage, distributing them among themselves and associates; that under this arrangement, the bonds were in fact distributed amongst the directors of the Atlantic & Pacific Railroad Company, and of the Pacific Railroad, and that the present holders received the bonds with full notice that they were an illegal and fraudulent issue. (Record, pp. 59, 60, 65.)

The directors and attorney agree to a consent foreclosure in four months from date of the mortgage.

It is further charged in such defense, that in furtherance of the conspiracy, the said directors and one James Baker, a director, and the attorney of the Pacific Railroad, prior even to a formal default on the bonds, agreed together to a foreclosure by consent of the fraudulent third mortgage.

The present suit was thereupon instituted in the name of Ketchum, at the procurement of such directors and Baker. (Record, p. 63.)

Bill filed Nov. 11, 1875.

The bill was printed and sworn to November 3, 1875, and was filed in the Circuit Court of the United States for the Eastern District of Missouri, on Nov. 11, 1873. (Record, pp. 5, 24.)

The bill recites the citizenship as follows: The complainant, *a citizen of New York*, and the defendants, Henry F. Vail, James D. Fish, Joseph Seligman, Edwin D. Morgan, Uriah A. Murdock, Luther C. Clark, and Jesse Seligman, *as citizens of the State of New York;* the Pacific Railroad, and remaining defendants, as *citizens of the State of Missouri.* (Record, pp. 6 and 7.)

This bill of complaint alleged the execution of said third mortgage, and that the complainant, Ketchum, was "the holder of many of said bonds."

The bill further charged that about $2,000,000 of the third mortgage bonds had been exchanged for income and improvement bonds, and "upwards of $300,000 had been negotiated by said company." (Record, p. 17, folio 49.)

That interest, due November 1, 1875, had not been paid, although demanded. That the trustees, Vail and Fish, had been required by complainant to discharge their duty under the mortgage and institute proceedings to foreclose the third mortgage, and protect the interests of their *cestui que trust*, but they had declined and failed so to do. (Record, p. 21, folio 63.)

The bill fully recited the lease to and possession by the Atlantic & Pacific Railroad, and that "it was necessary and essential for the interest of all parties interested in said two companies, that the said road should be continued to be operated and managed as one road." (Record, p. 19.)

It prayed in behalf of all the bondholders of such third mortgage, for a foreclosure and sale of said property, subject to prior mortgages, making the trustees under all such mortgages defendants. (Record, p. 23, folio 69.)

Baker appears for the corporation and files an answer confessing the bill.

The only jurisdiction obtained by the court over the Pacific Railroad was by the service of process upon and an entry of its appearance by James Baker, who filed, February 7, 1876, an answer in its name, admitting the validity of said third mortgage, and that all the bonds were outstanding, and held by *bona fide* holders, and the corporation was bound to pay principal and interest thereof, and that interest had been demanded and refused. (Record, p. 29.)

Intervention of stockholders.

On January 8, 1876, Thomas P. Akers, a stockholder of the Pacific Railroad, applied by petition to be allowed to defend for himself and other stockholders, alleging the illegal and fraudulent character of said bonds and mortgage, that the corporation was being managed by its enemies, and the directors were interested in such fraudulent bonds and had refused to defend. This application was on oath, and supported by affidavits. (Record, p. 26.)

On February 7, 1876, Akers filed, *by leave of court, his answer and cross-bill* "*in behalf of himself and all the other stockholders who might join him,*" *resisting the foreclosure, and praying the cancellation of the mortgage and bonds.* (Record, p. 27.)

February 15th, 1876, Garrison, Pierce and Seligman, all citizens of the State of New York, filed petition to be admitted as co-complainants. (Record, p. 32.)

On March 25th, 1876, R. L. Cutting, Jr., Peter Marie, Frank A. Otis and others, stockholders, *with leave of court*, filed their petition, making themselves parties defendant, and adopting the answer and cross-bill of Akers as their own, and joined with him in the prayer for relief. (Record, pp. 35 and 36.)

On March 10, 1876, complainants moved to strike out

Akers' answer and cross-bill, because it was filed without leave, and he was not a party defendant. (Record, p. 34.)

On April 3d, 1876, the court appointed a receiver of the property, "*reserving all rights and questions concerning the validity of said bonds and mortgage.*" (Record, p. 39.)

Same day, Aker's cross-bill was ordered to "be taken from the files, as the same is found to be defective in form," and leave was given him and county of St. Louis, *as stockholders*, to file an amended cross-bill within thirty days. (Record, p. 43.)

On April 3d, 1876, Vail and Fish took time until first Monday in June, (the fifth day of the month,) to answer, plead or demur. (Record, p. 44.)

On April 25th, Akers and the county of St. Louis filed amended answer and cross-bill, *by leave of court*, in behalf of themselves and all other stockholders. (Record, p. 44 to 66.)

This answer was under oath, and no exceptions or replications to the answer of the stockholders, nor answers to their cross-bill, were ever filed.

No evidence was ever taken in the cause, nor reference to a master moved or ordered.

On February 7, 1876, Joseph and Jesse Seligman, Morgan, Murdock and Clark entered their appearance by James Baker. (Record, p. 31.)

On June 5th, at an adjourned term, held by a judge called in from another district, the Atlantic and Pacific Railroad, Baker, Murdock, Clark, Morgan, Seligman, Lackland and Durkee filed their answers. (Record, p. 69.)

Without hearing or proofs Baker consents to a decree.

On the following day, June 6th, 1876, Vail and Fish, the trustees of the third mortgage, filed their answers, Akers and St. Louis County dismissed their cross-bill and withdrew answer. (Record, p. 70.) Immediately, without any proofs, hearing, reference or disposition of the equities reserved, a decree was entered, by the consent of all the parties, *other than the petitioning stockholders, who had been made parties, and had their answer and cross-bill on file by leave of court, and who had no notice of these proceedings.*

This decree falsely recites it is on "hearing and proofs." (Record, p. 72.)

Authorized exclusively by the consent aforesaid, it finds that the Pacific Railroad did convey and mortgage its property to Vail and Fish; the entire amount of $4,000,000 bonds had been issued; "that *a portion of said bonds* have been exchanged for income and improvement bonds; and that *a portion of said bonds* have been negotiated by said company. And it "further appearing that a number of said bonds are now in the possession of said trustees, Vail and Fish," that, "*of the said third mortgage bonds now outstanding*," none of the November 1st interest was paid. Ketchum owns 10 bonds; Cornelius K. Garrison 1,400; Thomas W. Pierce 50; and James Seligman 347; and that November 1st interest was demanded and refused. (Record, p. 76.)

Thereupon, it was ordered and decreed "that the Pacific Railroad *do stand absolutely barred and foreclosed of and from all equity of redemption* of, in and to the said mortgaged premises, property and franchises." And that it be sold at public auction by the Master "to pay and satisfy the amounts due by said company upon said bonds, and *any other indebtedness which the Court may order to be paid out of the proceeds of said sale.*" (Record, p. 77.)

The sale was ordered to be on sixty days' notice, by publication in newspapers in St. Louis, New York, and Boston. Report was to be made "immediately" of such sale. Payment of the bid, except bond for $200,000, was authorized to be made in *bona fide* third mortgage bonds. The Court further ordered that any holder of income or improvement bonds might surrender them prior to sale, and receive the third mortgage bonds from Vail & Fish. (Record, p. 79.)

The decree recites: "the Court expressly reserving for future consideration all questions as to the rights, priorities and interests of all parties claiming any interest herein by way of bonds or otherwise." (Record, p. 78, folio 232.)

Baker, the solicitor of the corporation, purchases its railroad.

The sale occurred on September 6. James Baker, being still the attorney and director of the Pacific Railroad, becamethe accepted bidder. (Record, p. 81.) He paid no money on his bid, but gave bond for the payment of $200,000.

Stockholders' petitions filed.

On September 15, the Master filed his report. (Return.) September 19, 22, stockholders' petitions were filed, objecting to the validity of said purchase by Baker, charging that the decree of June 6, was entered by his own fraud and collusion and without notice to petitioners or stockholders; that both said sale and decree should be vacated, and the case dismissed for want of jurisdiction.

The petitions prayed that such stockholders might be allowed either to answer, plead, demur or appeal. (Record 93, 96.)

Mrs. Mary Robb Miltenberger, a stockholder, filed a similar petition. (Record, p. 99.)

Both these petitions to open the foreclosure, and refuse confirmation of the sale to Baker, and for dismissal or appeal, were supported by oath, and no counter affidavits were offered to impeach their statements.

Sale confirmed to the attorney, and appeal denied to stockholders.

On the hearing of these applications, Oct. 3, 1876, the Circuit Court refused all relief; decreed that the petitioners should not be heard, either against the decree or the sale, (Record, p, 94,) and entered an order confirming the sale of the entire railroad to James Baker, on Oct. 6, 1876. (Record, p. 81.)

The Court further refused to entertain any prayer for, or allow an appeal to such petitioning stockholders. (Record, p. 98.)

Afterwards, Baker, on Oct. 20, delivered 3,848 bonds to the Master, paid $50,000 in cash, and on Oct. 23, 1876, gave a bond for the further payment if Court should order it of $550,000, with the complainant, Garrison, as one of his sureties, and received, under the orders of the Court, a conveyance to himself of all the Pacific Railroad and its appurtenances. (Sup. Record, p. 13.)

The Court, on October 25, directed Baker to be put into possession of his purchase. (Sup. Record, p. 16.)

Rule nisi and return.

On October 27, this Court laid a rule upon the Judges of said Circuit Court for the Eastern District of Missouri, to show cause why a mandamus should not issue, as prayed in the petition.

The return of the judges refers to and substantially relies upon, the transcript of record. It argumentatively therefrom justifies their refusal to recognize any right in the petitioners to be heard at the circuit, upon two grounds:

First, that the Court had no power at the term subsequent to that when the decree of foreclosure was rendered, to vacate, or, in any manner, change the same.

Second. That none of petitioners were parties and it was a matter of discretion to give them a standing in the cause, and permission was rightfully refused at the dates and under the circumstances. A further averment is made in the return, that a bill of review of the decree has been filed on Oct. 21, 1876, by another stockholder.

Notwithstanding such return, the petitioners now move that the rule, *nisi*, be made absolute, and a peremptory writ of mandamus issue to the judges of the Circuit Court, in the nature of a *procedando*, or to allow the appeals heretofore denied.

ARGUMENT.

I.

THE RELATION OF THE PARTIES TO THE RECORD IS FIRST TO BE CONSIDERED.

The return alleges that it is wholly apparent, from the transcript of record, that prior to the foreclosure decree the petitioners were "no parties to the cause," and further, that "they had the fullest opportunity to intervene by joining in the answers and cross-bills filed by said Akers and St. Louis County, and otherwise."

We challenge for error the statement of fact, as well as the legal conclusion.

The record shows (p. 34,), that upon March 25, 1876, Robert L. Cutting, Jr., Peter Marie, and other stockholders, upon leave of Court, made themselves co-defendants with Akers, and joined with him in his answer and cross-bill.

Akers had, on February 27, been given original leave to file such answer and cross-bill; (Record, p. 27,) against complainant's motion to strike them out (p. 34,) leave of court was again given, April 3, to him and the County of St. Louis to file an amended bill (p. 43,), and when the cross-bill was tendered upon April 25, leave of court was granted, for the third time, to file such a defense for himself and all the other stockholders. (Record, p. 44.)

This leave to the stockholders to take charge of the defense was granted, because the sworn application, and its supporting evidence and the corporate answer on file showed that the directors refused to make any defenses and were fraudulently sacrificing the interests of the stockholders.

According to well recognized equity practice, such an allowance of defense and the filing of an answer and cross-bill by a representative stockholder, for himself and all others of a numerous class, constituted all stockholders *quasi* parties to the cause.

Equity Rules, No. 48.

It has been expressly decided by this Court, that under such circumstances, the stockholders allowed to intervene and defend, "become real and substantial parties to the extent of their interests, *and those who may join them*, and against them any proceeding, order, or decree of the Court in the cause is binding, and may be enforced."

Bronson v. *LaCrosse R. R.*, 2 Wall., 402.
Railroad v. *Bradley*, 7 Wall., 577.
Peck v. *N. Y. & L. Steam. Co.*, 3 Bos., 622.
Thayer v. *Tool Co.*, 4 Gray, 75.

It is not mere analogy, so much as repeated precedent, which assimilates such a defense to the ordinary case of a bill prosecuted by one of a class for the benefit of all others similarly situated.

As to those unnamed upon the record, Ld. ELDON said, "they are in a sense before the Court."

Adair v. *New River Co.*, 11 Vesey, 429.

Story says such a bill or defense, by one or more of a class, "makes them all, in a sense, parties to the extent of asserting their rights."

Eq., Plead, § 116.

"Under such circumstances they are treated as parties to the suit."

Eq. Plead, § 99.

Daniels says "they are permitted to mix in the cause, as if they were parties."

2 Daniel Ch., 1213.

"They are *quasi* parties, who are entitled to be heard in proceedings which will affect their interest."

2 Smith Ch. Pr., 111.

But such *quasi* parties are not restricted to that position, or compelled to submit the conduct of their entire defense to the original intervenor.

The members of the class may intervene and make themselves actual parties, so long as the proceedings are *in fieri*, and are not definitely closed by the course and practice of the court.

The persons of the class interested may by petition be made parties and let into the cause, if their rights are interwoven with the others, so that they will be simultaneously disposed of.

1 Daniel Ch. Pr., 406.
Story Eq. Pl., 116.
Wood v. *Dummer*, 3 Mason, 315.
Gorman v. *Russell*, 14 Cal., 531.

Where some of the stockholders are, upon full hearing and allowance, made defendants in that character, the rule of practice is that other parties of that class make themselves actual parties by filing upon leave, a proper petition showing their identity of interest and adopting the pleadings already on file.

It is not required according to any authority on the subject, that there shall be any formal order making them parties. The original leave is considered to embrace each succeeding application. The leave to file their petition *ipso facto*, constitutes them parties.

Mitford says: "such a person coming in by petition, although he is not made a party by formal amendment or otherwise, is considered as a party to the cause in the subsequent proceedings."

Eq. Pl., 178.
Waite v. *Simple*, 1 S. & S., 219.

The reasonableness of this practice is apparent. In actions where defendants have concurrent interests, the proper and simplest method is to become a party by adopting the answer already on file, protecting the joint interest. A defendant answers sufficiently by adopting the answer of a co-defendant; thenceforward the pleading becomes his answer, precisely as though he had originally filed it in his own name.

Binney's Case, 2 Bland, 99.
Warfield v. *Banks*, 11 G. & J., 97.
1 Daniels Ch. Pr., 429.

Cestui que trusts having an identity of interests would not be allowed to sever in defense and unnecessarily cumber the record.

62 Eq. Rules.
Woods v. *Woods*, 5 Hare, 229.

And this practice was explicitly approved and enforced by this Court in a case where it was objected that no order had been made constituting an intervenor an actual party.

Myers v. *Fenn*, 5 Wall., 207.

In *Harrison* v. *Nixon*, 9 Peters, 491, divers parties not named as defendants, intervened by mere petition in the Circuit Court, in a suit brought by a plaintiff, alleging he was the next of kin, against an executor. No order was asked for or granted making them parties. Their petitions were dismissed, and upon the appeal prayed exclusively by such petitioners, the decree was reversed.

In *Ogilvie* v. *Knox Ins. Co.*, 2 Black., 539, the same rule was followed, and mere petitioners being of the same class as the original complainant, were considered to be actual parties to the suit.

Many other cases exhibit the practical application of this rule.

Blossom v. *R. R. Co.*, 1 Wall., 655.
Wittenburg v. *U. S.*, 5 Wall., 820.
Crawshay v. *Soutter*, 6 Wall., 739.
Cook v. *Younghall R. R.*, 4 Ch. App., 753.
Galveston R. R. v *Cowdrey*, 11 Wall, 459.

Such being the well attested practice in ordinary causes, where an action is brought or defended in the interest of a class the rule should certainly be more rigidly adhered to under the peculiar circumstances of this case.

The Court had possession of the *res*, by a receivership, to administer the trust property according to equity.

The charter, March 1, 1851, enacted that all the property of the company and all profits arising therefrom "shall be vested in the respective shareholders of the company forever, in proportion to their several shares." The lease provided that the rental should be payable directly to the shareholders without the intervention of the company. Literally therefore, their right in the mortgaged property was direct and not derivative. Any stockholder had the right to apply by petition *pro interesse suo*, to protect his interest and prevent any injury to the trusts by the collusion of other parties.

Nor has the Court, holding the *res* to the exclusion of all other judicial interference, the right to reject such intervention and denominate its refusal the exercise of a mere discretionary function.

Having exclusive possession and authority, it *becomes the judicial duty* to supervise, protect and preserve the fund which is in *custodia legis* from all fraud, unfairness and imposition especially if attempted through its process.

Gillespie v. *Alexander*, 3 Rus., 130.
Williams v. *Gibbs*, 17 How., 257.

Ex parte Howard, 9 Wall., 175.
Russell v. *East Ang. R.*, 3 McN & G, 134.
Kerr on Rec., 173.

It cannot admit of serious question therefore, that the stockholders of this corporation were constituted *quasi* parties to the record, when the court allowed Akers to become a defendant in his capacity as a stockholder; that the later allowance of the petitions of the other stockholders made them actual parties, and constituted the Akers answer and cross-bill, the pleading also of his co-stockholders who adopted it.

Such being the condition of the record and pleadings on June 6, Akers and St. Louis County, were allowed on their motion and without notice to their co-stockholders, " todismiss their cross-bill and withdraw their answer."

The precise effect of the allowance of that motion is clear. It was equivalent to striking the names of the disclaimers from the pleading, and had no further force.

1 Daniel Ch. Pr., 792.
Brown v. *Sawyer*, 3 Beav., 598.

The pleading was a joint one, precisely as though petitioners' names were inserted in it. Akers and St. Louis County had consequently no right to withdraw the pleading except so far as they were personally concerned, and in such manner as not to prejudice the other stockholders who did not dismiss. Simply because their co-defendants withdrew, did not eject Cutting, Marie and others from the record, or in any manner deprive them of the full benefit of the pleading, which they had made their own.

Kellogg v. *Forsyth*, 24 How., 186.
Johnson v. *Hammersly*, 24 Beav., 498.
Armstrong v. *Stover*, 9 Beav., 277.

As this Court under precisely similar circumstances has decided, they had the clear right to maintain the defence separately for their benefit although it was deserted by the others.

Todd v. *Daniel*, 16 Peters, 523.

Upon the face of the record therefore Cutting, Marie and the other petitioning stockholders, became actual parties to the suit on March 25, and had an answer and cross-bill on the files when this decree of June 6, was taken.

II.

SUCH STOCKHOLDERS WERE THEREFORE PROPERLY BEFORE THE COURT, AND HAD THE CLEAR LEGAL RIGHT TO A REHEARING OR AN APPEAL ON THE DECREE OF JUNE 6.

The petitioners, it will be observed, pray either for a re-hearing on the merits or the question of jurisdiction or for an appeal.

The practice of the High Court of Chancery in England, by which the circuit court is regulated, was always liberal in fixing boundaries to the allowance of a re-hearing or appeal.

Considering the attitude of these stockholders on the weakest theory, as only *quasi* parties to this litigation, they are indisputably within the privilege.

"It is not necessary that the party who appeals should be actually a party to the record, provided he has an interest in the question which may be affected by the decree or order appealed from."

2 Daniel Ch. Pr., 1460.

Any person a *quasi* party may, if aggrieved by any order in the suit, present a petition for re-hearing in the usual manner.

Ellison v. *Thomas*, 1 De G. J. & S., 18.
Kidd v. *Cheyne*, 18 Jur., 348.
Barker v. *Barker*, 39 N. H. 408.
Kellogg v. *Forsyth*, 24 How., 186.

In one case, Ld. Redesdale allowed a case to stand over with liberty to a petitioner to make himself a party to a cause after decree, by supplemental bill, for the sole purpose of appealing and impeaching the decree. And the House of Lords on the advice of the Lord Chancellor of England, made an order permitting such procedure.

Gifford v. *Hart*, 1 Sch. & Lef., 409.
Osborne v. *Uster*, 2 Bro. P. C., 314.

The right to a re-hearing or appeal is a remedial process due and grantable *ex debito justitiae*. In the scheme of federal judicature there is no lodgment for the pretense that any ruling, order or decree of the Circuit Court in a case of original cognizance, cannot be reviewed either by itself or in an appellate court, and challenged for error by a party or privy to the record who is aggrieved thereby.

It has been the uniform practice of the court, in view of this principle, to place the most liberal construction upon the statutes regulating the right of appeal.

Granting it to an informer whose petition, praying to be paid portion of forfeiture, was dismissed.

Westcott v. *Bradford*, 4 W. C. C., 492.

To a bidder who petitioned to have sale confirmed to him, which was refused.

Blossom v. *R. R. Co.*, 1 Wall., 655.

To a petitioner in case of prize.

Wittenberg v. *U. S.*, 5 Wall., 820.

To a salvage claimant whose petition was refused.

Stratton v. *Jarvis*, 8 Peters, 4.

To a bondholder who intervened for his protection.

Crawshay v. *Soutter*, 6 Wall., 739.

To stockholders.

Bronson v. *LaCrosse R. R.*, 2 Wall., 302.
Cook v. *Yonghaul R.*, 4 Ch. App., 753.

To an alien enemy from a decree of forfeiture.
McVeigh v. *U. S.*, 11 Wall., 267.

To a petitioner whose *audita querela* had been refused.
N. O. Railway v. *Morgan*, 10 Wall., 258.

In an action *in rem* when a claimant appears, "he becomes a party to the proceedings, and may defend, take an appeal or writ of error, or adopt any other proceeding that a party properly before the court may be entitled to."
Steamb. Burns, 9 Wall., 239.

According to all ordinary tests, the application for rehearing the case was upon proper grounds and in apt time.

Practically there was no hearing or definite sentence of the court pronounced on hearing and understanding all the points in issue. The decree is based solely on the consent of certain adjudged faithless trustees, and claimed to be an estoppel against those as to whom the cause has not been heard at all.

Such a decree may of right be challenged for error apparent by an aggrieved party, and it can hardly be said that it is a final decree as to him.

To demonstrate that discharging the enrolment of such a decree is not to be refused on the ground that the jurisdiction invoked is discretionary, attention will be called to some of its extraordinary and oppressive features.

1. *As to the debt adjudged to be due.*

The decree must bear one of two constructions. Either it altogether fails to find the amount of the debt due for which the property was to be sold, or it decrees for the entire principal and interest of the bonds. In either event it is grossly erroneous.

First.—An interlocutory decree in a suit for foreclosure directed the mortgagor to pay the sums due the complainants, *not specifying them*. Afterwards, decree was made reciting that mortgagor had failed to pay as ordered, and directed the sale of so much of the property as would pay to certain mortgagees a sum which did not appear from any part of the record to be the true sum. Held, both decrees were wholly erroneous and that the decree should have ascertained the exact sum and stated it.

Hopkins v. *Ward*, 12 B. Mon., 185.
Cox v. *Wheeler*, 7 Paige, 284.

The amount due on the mortgage is imperatively required to be found in the *nisi* decree.

Hazen v. *Ried*, 30 Mich., 331.
Guy v. *Franklin*, 5 Cal., 416.
Beville v. *McIntosh*, 41 Miss., 516.
Wylie v. *McMakin*, 2 Md. Ch., 413.
Graham v. *King*, 15 Ala., 363.
King v. *Longworth*, 7 Ohio, 522.
Wennwag v. *Brown*, 3 Blackf., 457.

And this is precisely in accord with the practice in the English High Court of Chancery, which is the practice of the Circuit Courts of the U. S.

Smith v. *Robinson*, 17 E. L. & E., 450.
Bell v. *Carter*, 19 E. L. & E., 56.

The reason of this is obvious and just.

It enables the mortgagor to prevent an extinguishment of his equity of redemption by paying the installment or sum adjudged to be actually due.

Rice v. *Cribb*, 12 Wis., 179.
Peyton v. *Ayres*, 2 Md. Ch., 64.
Mann v. *Richardson*, 21 Pick., 355.
Lansing v. *Capron*, 1 Johns. Ch, 617.
Fleming v. *Soutter*, 6 Wall., 747.
Bronson v. *La Crosse R. R.*, 2 Wall., 312.
Mil. & Minn. R. R. v. *Soutter*, 2 Wall., 440.

The right of the mortgagor to have restoration of his property on payment of the sum due and settled in the decree is not a matter of discretion, but of strict legal right.

R. R. Co. v. *Soutter*, 2 Wall., 510.
R. R. Co. v. *Howard*, 6 Wall., 752.

The decree herein recites that of $4,000,000 of the issue of bonds sought to be foreclosed, "a portion" have been exchanged for other bonds, "a portion" have been negotiated, and "a number" still remain in the hands of the trustees; and that "*of those outstanding*" the November 1 interest has not been paid. But what portion has been sold or exchanged, and what number remain in trust, and how many are outstanding is left wholly unrecited and indefinite.

In a case of such magnitude, involving such vast interests, it was sought by this collusive decree, without any reference to a master even approximately to state the sum due, to instantly bar the equity of redemption by withholding from the decree any statement of the sum required to protect the equity from sale.

If the ordinary rule is as stated, how much greater reason for its rigid application in a case where not only the amount but the validity of the debt was being fiercely contested, and the Court had expressly reserved all questions concerning such issues.

Second. It is claimed, however, that the decree is substantially a finding for the full principal and interest of the entire issue of bonds.

In this view the decree is not only taken contrary to practice, but is so grossly unconscionable as to shock the sense.

The principal of these bonds does not become due by their terms until July 10, 1895. Nothing either in them or the mortgage, under any circumstances of default makes them due at any earlier date.

It is the ordinary case of an attempted foreclosure for interest only.

In such cases, if the decree is enrolled for a larger amount than is then actually due by the terms of the obligation, it is error, because it substantially and injuriously alters the contract of the parties, and is not within the scope of the defeasance.

Smith v. *Smith*, 32 Ill., 202.
Rains v. *Mann*, 68 Ill., 264.
Tompkins v. *Wiltberger*, 56 Ill., 385.
Ames v. *Ames*, 5 Wis., 160.

It has never been adjudged that for a failure to pay one of several installments a court of equity will decree a conclusive foreclosure as to the whole property.

Caufman v. *Jayne*, 2 B. Mon., 204.
James v. *Fisk*, 9 Sm. & M., 144.
Duffern v. *Johnson*, 1 Paige, 450.

The decree will either order so much to be sold as will satisfy the installment due, or will decree a sale *subject to the installments to become due thereafter.*

Mines v. *Moore*, 41 Ill., 275.
Weiner v. *Hentz*, 17 Ill., 259.
Bronson v. *LaCrosse R. R.*, 2 Wall., 312.
Fleming v. *Soutter*, 6 Wall., 747.

In no case is it tolerable to charge the equity as the price of redemption with a larger sum than is actually due.

Any decree, therefore, declaring the principal of these bonds to be presently due, and to be redeemed against, nineteen years before their maturity, is irregular and unconscionable.

2. *It provided no time, place or terms of redemption.*

This is of the essence of foreclosure proceedings and not a matter of discretion. Even though it be expressly agreed in the defeasance there shall be no redemption, chancery will relieve and hold such a stipulation void as being unconscionable.

Story Eq., §§ 1008, 1009.

That a period or short day shall be allowed in the decree for redemption is held to be a matter of right, an omission of which is good ground for reversing the decree.

Woodward v. *Fitzpatrick*, 2 B. Mon., 61.
2 Hilliard on Mort., 41, § 14.
Harkins v. *Forsyth*, 11 Leigh, 294.
Jones v. *Bosworth*, 3 Bland., 194.
David v. *Graham*, 2 H. & G., 94.
Farwell v. *Barber*, 50 Ill., 274.
McIntyre v. *Whitfield*, 13 Sm. & M., 88.

The equity rules adopt the English practice. Coote thus states it:

" The case is referred to a master, and a decree is rendered to pay the debt and costs in six months after the report. The master makes a report, fixing the day of payment, and his report is confirmed. If the defendant then make default, the mortgagee may have an absolute foreclosure."

Coote on Mort., p. 566.
Bell v. *Carter*, 19 E. L. & E., 56.
Smith v. *Robinson*, 17 E. L. & E., 450.

By Ordinances 37, 10, six calendar months are given for redemption, after the chief clerk's certificate.

Seton on D., 364, No. 1.

" The decree *nisi* in this case, required, in effect, the payment to be made *instanter*, and nothing in the record is furnished to justify such extreme rigor. The giving day is not a mere matter of form."

Richardson v. *Parrott's heirs*, 7 B. Mon., 386.

This Court in *Clark* v. *Reyburn*, 8 Wall., 318, censured such unconscionable asd unknown practice as is disclosed in this record, holding that " a decree of strict foreclosure which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, cannot be sustained."

And in *Bronson* v. *La Crosse R. R. Co.*, 2 Wall, 312, established the precedent of a year's time to pay even an installment of interest.

This decree is open to all the objections for which the court declared that in *Clark* v. *Reyburn* as "fatally defective."

Without naming any certain sum, or any officer or place to whom or where it is to be paid to save the estate, without any decree *nisi*, or short day named, it adjudges that "the said Pacific Railroad DO STAND *absolutely debarred and foreclosed*, of and from all equity of redemption of, in or to the said mortgaged premises," &c.

No such decree ever has been or ought to be sustained in a court of chancery.

3. *The decree was snatched in flagrant defiance of all equity practice, and the standing rules.*

The rules allow three months to litigants after issue joined, before the cause can be set down for hearing, and without notice the petitioners were excluded from that right and their interests sought to be forclosed by a decree taken on the very day the trustees filed a formal answer.

The object of allowing some of the stockholders to defend, was to enable the court to honestly, fairly and fully ascertain and try the general right in contest.

No replication being filed to the stockholders' answer, the matter was to be taken as absolutely true, or the bill was subject to dismissal under the 66th equity rule.

To go to a collusive hearing without any replication being filed, or answer to the cross-bill, was a gross irregularity.

Wash. R. R. v. *Bradleys*, 10 Wall, 302.

By the interlocutory decree the equities were reserved as to the validity of the bonds and mortgages, and *sub si-*

lentio this consent decree undertakes to conclude the stockholders without any proof or hearing on such reserved equities.

Pending the issues tendered by the stockholders' answer which stood confessed under the rules, it was not competent for the colluding parties to snatch a decree without hearing or proofs of any kind.

2 Daniels Ch., 394.
Bligh v. *Tredgett*, 5 De G. & S., 74.

If the attention of the court had been at the time called to the state of the record, it would not have awarded such a decree in the face of the sworn answer wholly undenied.

Moore v. *Huntington*, 17 Wall., 417.
Jones v. *Bolles*, 9 Wall., 369.
1 Bro. Ch. Cas., 52.

If advised, it would have withheld such a decree, on the score of public justice, to prevent scandalous abuses and protect absent parties against gross oppression.

All those who take advantage of such a conspicuous breach of trust of corporate officers in consenting to such a decree are *particeps criminis*, and cannot hold an advantage so obtained.

Campbell v. *R. R.* 1 Wood, 368.
Talbott v. *Todd*, 5 Dana, 193.

It is not pretended but that, on the legal merits, the decree is erroneous; but the respondents' defense is, that upon the adjournment of the term at which the sale decree was rendered the Court ceased to have any power over it, and for that lack of jurisdiction it refused to entertain the application to re-hear.

The rule prohibiting any modification of an enrolled final decree has been, of late years, subjected to so many exceptions that text writers have declared it practically obsolete.

The doctrine was bottomed upon the theory that the jurisdiction was discharged by the entry of the final decree; that the cause being no longer on the docket, the defendant was not within the control of the Court for any purpose. Obviously such reasons are grossly inapplicable when the cause is upon the docket, all the parties active litigants, and the defendant's entire property being operated by sequestrators.

There always existed well recognized exceptions to the rule.

If the decree was for too large an amount, it was subject at a succeeding term to be amended according to the truth.

U. S. v. *Flasson*, 5 Cranch, C. C. 95.

Any amendment that under the statute of *jeofails* would have been allowed, as a matter of course, is still within the judicial power.

Bank v. *Wistar*, 3 Peters, 431.

Especially in foreclosure proceedings, the Chancellor's power was plenary, to state the true amount of debt charged against the equity, and enlarge the day of redemption.

Coffy v. *Coffy*, 16 Ill., 141.
Talbott v. *Todd*, 5 Dana, 193.

The 88th standing rule in Equity gives the Circuit Court unquestioned power to discharge an enrolment, and grant a re-hearing, at any time "before the end of the next term of Court," in cases where no appeal lies.

Whenever the decree has been entered by collusive consent or by fraudulent conduct, to the injury of a party without fault, it can be reached and cause re-heard, although the term has expired.

Huntington v. *Finch*, 3 Ohio S., 445.
Binse v. *Barker*, 13 N. J., (L.,) 263.

Under such circumstances, this Court has several times overruled the objection to want of jurisdiction, and distinctly adjudged, "the question of the close of the term has no place."

Ex parte Crenshaw, 15 Peters, 129.
U. S. v. *Gomez*, 23 How., 331.

But apart from the question of power in the Circuit Court to hear the cause on its merits *for mere error*, the petitioners had the absolute right to ask the vacation of the decree, because the Circuit Court had no original jurisdiction to entertain or decide the controversy.

In support of this claim, is our proposition:

III.

BY REASON OF THE CITIZENSHIP OF THE PARTIES, APPARENT ON THE RECORD, THE CIRCUIT COURT HAD NO JURISDICTION UNDER THE CONSTITUTION AND LAWS OF CONGRESS TO ENTERTAIN THIS ACTION OR ENTER ANY DECREE WHATEVER.

The Constitution limits the exercise of the judicial power "to controversies between citizens of different States," except where jurisdiction is made to depend on some subject matter peculiarly of federal cognizance.

Indicating only the boundaries of the power, it remits to Congress the duty of creating subordinate tribunals, and prescribing under what circumstances and in what mode their jurisdiction shall be exercised.

The act of March 3, 1875, is the latest and most comprehensive grant of power to the Circuit Court.

It thus defines and limits its original jurisdiction:

"The Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity * * * * in which there shall be a controversy between citizens of the different States," &c.

The judicial interpretations of this Court regulating the exercise and enforcing the limitations of jurisdiction of courts of original cognizance, have been so clear and uniform, as to carry all the force of positive enactment.

Certain requirements are declared to be absolutely indispensable to the lawful exercise of judicial functions by the Circuit Courts.

Rejecting the ordinary doctrine as to the presumption attending the acts of superior tribunals, it was early and has since been consistently adjudged, that the express allegation of the facts necessary to give jurisdiction, is essential because such courts are of special statutory and limited jurisdiction, and, consequently, there is no presumption in favor of their jurisdiction where the facts necessary to show it do not affirmatively appear on the record.

Turner v. *Enville*, 4 Dall., 7.
Scott v. *Sanford*, 19 How., 393.
Jackson v. *Ashton*, 8 Peters, 148.
Cary v. *Curtis*, 3 How., 545.
Morgan's Ex. v. *Gay*, 19 Wall., 82.
Mason v. *Robinson*, 13 Wall., 602.
Hornshall v. *Collector*, 9 Wall., 564.
Ramsey v. *R. R. Co.*, 22 Wall., 328.

Where the jurisdictional fact depends upon the character of the parties and not the subject matter of the suit, the citizenship of all the parties must affirmatively appear to be such, as that each plaintiff is entitled to sue and each defendant liable to be sued, in that court.

Coal Co. v. *Blatchford*, 11 Wall., 170.
Knapp v. *R. R. Co.*, 20 Wall., 117.
Sewing Machine Co., 18 Wall., 575.
Gardner v. *Brown*, 21 Wall., 36.

In actual practice, the rules for applying these tests of the jurisdiction are well settled.

1. If the record is silent as to the jurisdictional character of citizenship, the judicial proceedings are subject to be avoided on error or appeal.

Ex parte Watkins, 3 Peters, 193.
Kennedy v. *Georgia State Bk.*, 8 How., 586.

2. If the citizenship is so laid, that the jurisdiction would *prima facie* attach, but, in point of fact, is falsely averred, the apparent jurisdiction must be ousted by pleading the truth in abatement.

Livingston v. *Story*, 11 Peters, 353.
De Sobry v. *Nicholson*, 3 Wall., 423.

3. In all cases where the citizenship is so averred as to exhibit on the very face of the record a controversy wholly or partly between citizens of the same State, "the judicial power" does not, and cannot, under the Constitution, extend to such a controversy; the Circuit Court has, consequently, no jurisdiction, and its decrees and acts thereunder would be void.

Hickey v. *Stewart*, 3 How., 750.
Erlow v. *Lowry*, 7 How., 172.
Elliott v. *Perriol*, 2 Peters, 329.
North Ind. R. R. v. *M. C. R. R.*, 15 How., 233.

4. This rule is so rigid that the result is not altered, though the subject matter of the controversy relates to exclusively federal questions, if Congress has left the jurisdiction to depend on adverse citizenship and not upon subject matter.

Controversies between citizens of the same State touching the abandoned property acts are not cognizable.

Jackson v. *Ashton*, 8 Peters, 148.
Mail Co. v *Flanders*, 12 Wall., 130.

Nor under the Customs Act.

Ins. Co. v. *Ritchie*, 4 Wall., 542.
Hornshall v. *Collector*, 9 Wall., 564.

5. The non-suable character of a defendant in the Circuit Court is a constitutional limitation and not a personal privilege, which can legally be waived and thus enable the judicial power to act upon a controversy to which, under the Constitution, it does not extend. Nor can the Court treat such limitations upon its jurisdiction as merely technical, and to be dispensed with, relieved against or cured by any act of the parties.

U. S. v. *Curry*, 6 How., 113.

Positive consent cannot therefore either originally authorize the exercise of jurisdiction in such a case or rescue from annulment the decrees entered in violation of the constitutional prohibition.

Scott v. *Sandford*, 19 How., 393.
Mail Co. v. *Flanders*, 12 Wall., 135.
Ramsey v. *R. R. Co.*, 22 Wall., 328.

6. Where an original bill or complaint affirmatively shows a controversy between citizens of the same State, this defect of jurisdiction is apparent, and may be taken advantage of by demurrer or motion at any stage of the proceedings either in the Circuit Court or on appeal.

Jackson v. *Ashton*, 8 Peters, 148.
Capron v. *Van Norden*, 2 Cranch.
Mason v. *Robbins*, 13 Wall., 602.
Nazro v. *Cragin*, 3 Dillon, 474.
Ins. Co. v. *Francis*, 11 Wall., 216.
Coal Co. v. *Blatchford*, 11 Wall., 178.

7. There exists a single qualification to the above rules, namely: where a mere nominal party having similar citizenship to the complainants, or some of them, is made a co-defendant, the jurisdiction may be saved by striking out at any time *before hearing*, the name of such nominal party, and proceeding to decree against the real parties in interest who are liable to suit.

The rule is thus stated by Chief Justice MARSHALL in *Connolly* v. *Taylor*, 2 Peters, 564:

"The substantial parties are aliens, and the court had original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction by uniting with themselves a person, between whom and one of the defendants the court cannot take jurisdiction. Had the cause come on for hearing in this state of parties, a decree could not have been made for want of jurisdiction."

And the practice has been approved in *Hone* v. *Lockhardt*, 17 Wall., 579.

And by the present Chief Justice in *Richards* v. *Chesapeake & Ohio R. R.*, (MSS. Opinion, U. S. C. Ct., East. Dist. Virginia).

Applying these principles to test the jurisdiction of the Circuit Court in this cause, we find a bill in chancery filed by Ketchum, describing himself as a *citizen of New York*, making defendants six persons alleged to be *citizens of New York*, and several others alleged to be *citizens of Missouri*.

Obviously such a pleading presents a controversy over which the Circuit Court could not constitutionally exercise any jurisdiction whatever, unless the six defendants having the same citizenship as the complainant, were merely nominal parties, in which event the bill might be dismissed as to them, and retained for decree against the remaining defendants.

"The question always is, and should be, when objection is taken to the jurisdiction of the court, by reason of the citizenship of some of the parties, whether to a decree authorized by the case presented, they are indispensable parties."

Hone v. *Lockhardt*, 17 Wall., 579.

The relation of these six citizens of New York to the subject matter of controversy and the relief prayed, will demonstrate whether, under the rulings of this Court, there were nominal or indispensable parties to authorize any decree whatever.

Vail and Fish were the trustees in the very mortgage sought to be foreclosed. Not only the amount due, but the validity of that mortgage was to be litigated.

The legal estate was vested in them.

"They are parties to the mortgage-contract—negotiating its terms and stipulations, and to them the usual rights and powers of mortgagees are reserved, and to them the usual obligations of mortgagors are made."

Coal Co. v. *Blatchford*, 11 Wall., 170.

Still more recently it has been decided, that the trustees in such an instrument are not nominal, but are the real parties in interest to enforce a claim accruing to them in the execution of their trust, and are charged with the responsibility of conducting the litigation.

Knapp v. *R. R. Co.*, 20 Wall., 123.
Gardner v. *Brown*, 21 Wall., 36.

This proceeding did not simply embrace a formal foreclosure on bonds outstanding at the time when the bill was filed. It had broader scope. The decree found that divers unissued third mortgage bonds were even then in hands of Vail and Fish, who were ordered to exchange them at any time before sale for income and improvement bonds, and these very bonds thus emitted after decree and before sale, were declared to be a legal tender on the bid.

The court thus assumed the general guardianship of an executory trust, acting directly *in personam* upon citizens of New York, at the suit of another citizen of the same State.

The only standing which Ketchum had in a Court of Equity to foreclose the mortgage or enforce the trust was the *alleged* malfeasance of the trustees.

"So long as the trustees do not refuse to discharge the trust reposed in them, other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over them."

Coal Co. v. *Blatchford*, 11 Wall., 170.

"The bondholders can ask the aid of a Court of Equity only on the ground of unfaithfulness, neglect or inability on the part of the trustees. The only standing the original complainants had in court arose from the allegation in their bill that the trustees in their mortgage were derelict."

Per Wait, C. J. in Richard v. *Ches. & O. R. R.*, U. S. Circuit Ct. East Dist. of Va.

Ketchum's bill in this case made the allegation of unfaithfulness. Whatever was necessary to be alleged must necessarily be proven at the hearing, to justify relief.

In this view the suit was primarily and directly against the trustees charging a breach of trust, *and that must be alleged and proven as a condition precedent to any remaining relief.*

Walker v. *Sigmonds*, 3 Swanst, 75.
Perry v. *Knapp*, 4 Beav, 179.
Dodge v. *Woolsey*, 18 How., 331.
Memphis v. *Dean*, 8 Wall., 73.
Cooper v. *Carter*, 15 E. L. & E., 591.
McGuire v. *Shafer*, 7 Watts, 412.

Summoned to answer the charge of infidelity to his trust, the trustee could of course plead to the jurisdiction, tender an issue defending his primary control of the trust vested in him; advance evidence and appeal from a decree convicting him of a breach of trust or displacing him.

Memphis City v. *Dean*, 8 Wall., 73.

This would obviously constitute a material and definite controversy, incapable of being tried in a Federal Court, between bondholders and trustees of a similar citizenship

This was the precise issue tendered by the bill in this cause. The trustees filed no cross-bill. This decree of foreclosure was based on the original bill of the bondholder. This could only be justified on the theory that the charge of dereliction had been proven or admitted.

Over that controversy, the settlement of which was an indispensable prerequisite to any relief, the Circuit Court had no jurisdiction whatever, because it was exclusively between citizens of the same State.

The trustees might, *in limine*, have raised the question of jurisdiction, and thus dismissed the action. The fact that another controversy might exist in the cause between parties of adverse citizenship, would not save the jurisdiction.

Such a construction of the act would be unconstitutional.

Sewing Machine case, 18 Wall., 575.
Vannever v. *Bryant*, 21 Wall., 41.

The other citizens of New York, defendants, were trustees under prior mortgages.

The scope of the bill was to sell, subject to such earlier encumbrances. This necessitated an issue as to their extent, validity, date and amount. The decree adjudged upon such matters, and ordered the sale subject to these ascertained encumbrances. They were never dismissed from the record and are indispensable parties to the validity or efficiency of the decree as enrolled.

The same objections exist against this exercise of jurisdiction in the case of the other citizens of New York defendants, which apply to Vail and Fish.

For these reasons, we submit that the judicial power of the United States does not extend to the controversy disclosed by this record; that the want of jurisdiction is obvious and indis~~[illegible]~~putable on the very face of the papers; that the decree of foreclosure and other proceedings are void.

Mail Co. v. *Flanders*, 12 Wall, 135.

When this objection to the jurisdiction was presented, the cause was upon the docket, the corporate property in the custody of the Court, and no confirmation had taken place.

The right of any actual or constructive party, to an appeal to this Court to procure the annulment of all the orders of the Circuit Court, the dismissal of the cause, and the restoration of the property to the condition it was in prior to the litigation, stands upon too clear a basis of precedent to be shaken.

Nelson v. *Leland*, 22 How., 49.
U. S. v. *Nouse*, 6 Peters., 494.
Morris Cotton, 8 Wall., 512.
Ibid, 9 " 605.
Mail Co. v. *Flanders*, 12 Wall., 135.

It was the judicial duty, *sua sponte*, to take notice of the want of jurisdiction; and a petition to vacate the decrees and dismiss the cause, was properly filed at any stage of the proceedings, while the court held possession of the property.

The Circuit Court had no discretion to refuse to act on such an application, and retain and exercise further judicial authority over a cause which it was prohibited from considering. It thereby committed a clear excess of jurisdiction, and can be restrained within the bounds of its authority by mandamus.

If it should be decided that petitioners were not entitled at the time and under the circumstances, to vacate or modify the decree of June 6, there were two absolute rights vested in them wholly emancipated from any discretion of the Circuit Court.

IV.

THE PETITIONERS, WHETHER ACTUAL OR ONLY CONSTRUCTIVE PARTIES TO THE RECORD, HAD THE RIGHT OF APPEAL TO THIS COURT FROM DECREE OF SALE.

The decree was, in its nature, appealable.

Ray v. *Law*, 3 Cranch., 179.
Whiting v. *B'k of U. S.*, 13 Peters.
Bronson v. *LaSalle R. R.*, 2 Black., 524.

The allowance of the appeal is, upon application, a matter of course. "The Court cannot prevent it, nor is the right dependent upon any judicial discretion."

Dos Hermanos, 10 Wheat., 306.
U. S. v. *Adams*, 6 Wall., 107.

The petitioners and their interests being properly before the court, and the claim being that the decree concluded their rights, they are "aggrieved thereby," and fall clearly within the description of those entitled to an appeal, and are entitled to take the judgment of this Court on the validity of these proceedings, according to the authorities before cited under the second point.

V.

THE PROCEEDINGS BEING IN FIERI, THE PETITIONERS HAD THE FURUHER RIGHT TO BE HEARD UPON THE AMOUNT OF THE DEBT AND THE CONFIRMATION OF THE SALE TO BAKER.

This Court having allowed answers and cross-bills to be filed by some of the stockholders, and entertained petitions of others of the class, adopting them, they became so connected with the records as parties, that the Court had no judicial right to ignore or eject them. It could not restrict them in defense to any particular portion of the proceedings. The sale decree was not conclusive of the debt, any interest might challenge it.

Galveston R. R. v. *Cowdrey*, 11 Wall., 479.
Whitaker v. *Wright*, 2 Hare, 310.

They had as much right to be heard as to what judicial action should be taken on the bid of the corporation's solicitor as to resist any earlier proceedings when they occurred. They were fully capacitated to contest any and every step of their adversaries during the entire course of the litigation. No precedent exists for fixing boundaries to the right of defense, nor can the absolute and peremptory silencing of an important interest be justified by referring it to the discretionary powers of the Court.

VI.

THE SALE TO JAMES BAKER, THE SOLICITOR AND DIRECTOR OF THE PACIFIC RAILROAD, WAS UNDER THE CIRCUMSTANCES, A GROSS FRAUD. HE WAS INCOMPETENT TO PURCHASE, THE SALE WAS ERRONEOUSLY CONFIRMED OVER PETITIONERS' OBJECTIONS, AND THEY WERE ENTITLED TO APPEAL FROM THAT ORDER.

The right of appeal is fully substantiated by three well considered cases in this Court.

Orchard v. *Hughes*, 1 Wall., 657, 405.
Mil. R. R. v. *Soutter*, 5 Wall., 660.
Crawshay v. *Soutter*, 6 Wall., 739.

The power of confirmation is to be exercised in the interest of justice and the rights of all concerned.

The question was triable on affidavits.

Cocks v. *Izard*, 7 Wall., 559.
Shonemus v. *Corwin*, 9 Ohio, 5,366.
Savery v. *Sypher*, 6 Wall., 159.

The petitions sworn to remain uncontradicted.

Baker was wholly incapacitated from making such a purchase by reason of his fiduciary capacity.

Michoud & Girod, 4 How., 503.
Cov. & Lex. R. R. v. *Bowler*, 9 Bush., (Ky.) 468.
Ex parte James, 8 Ves., 352,
Godin v. *Canal Co.*, 18 Ohio S., 182.
Hoyle v. *Plat. & M. R.*, 54 N. Y., 314.

The sole ingredient of such a purchase by the solicitor, in the interest of public justice, is declared to carry fraud on its face, no matter with what judicial authority or ministerial exactness the act may be clothed.

It is a rule founded upon sound policy and clear principles of equity, and has received unequivocal endorsement by this Court.

Ordinarily the purchase price is a charge on the estate upon re-sale, but if the purchase was made in bad faith, and with the intent to speculate at the expense of the rights and interest of the client, using the knowledge derived from that relation for this purpose, the remedy might not be to strong even to set aside the sale and relieve the property from the encumbrance without the terms mentioned.

Stockton v. *Ford*, 11 How., 247.

And again this language is used in condemnation of a purchase of the estate by a solicitor:

" When all these acts on the part of the appellant are adverted to, they impel irresistibly to the conclusion, that the gross inadequacy of consideration in the sale and purchase of these lands, was the premeditated result which the proceedings by the appellant were put in practice to insure. They betray that *malus dolus* in which the design of the appellant was conceived, which appears to have presided over and regulated the progress of the design from its birth to its consummation, to which design the appellant has tenaciously clung in the seeming expectation that it was beyond the corrective powers of law or justice."

"Upon the whole case, we are constrained to view the entire transaction impeached by the appellee as one that cannot be sustained without the subversion of the principles and rules either of legal or moral justice. We accordingly approve the decision of the Circuit Court in so regarding it, and order that decree to be approved."

Byers v. *Linget*, 19 How., 312.

Remembering that this suit was inspired by Baker,—brought under his supervision—and that he, as solicitor, entered the corporate appearance and consented to the oppressive, fraudulent and false decree, under which he now, as purchaser, claims title to all the corporate property to which he owed his best services as adviser and defender, the case furnishes the very worst of that rapidly growing list of attempts by trustees to acquire valuable railway property through the medium of their own constructive frauds.

James v. *R. R. Co.*, 6 Wall., 752.
R. R. Co. v. *Howard*, 7 Wall., 392.
Drury v. *Cross*, 7 Wall., 302.
Wash. R. R. v. *Bradleys*, 10 Wall., 303.
Harwood v. *R. R. Co.*, 14 Wall., 78.
Cov. & Lex. R. R. Co. v. *Bowler*, 9 Bush., 468.
Campbell v. *R. R. Co.*, 1 Woods, 368.
Jackson v. *Lueding*, 21 Wall., 592.

VII.

THE PETITIONERS HAVE NO ADEQUATE REMEDY EXCEPT BY MANDAMUS.

The refusal of the Circuit Judges to entertain or act upon any application of the petitioners, either to re-hear or dismiss the cause, or refuse confirmation or grant an ap peal, was the declination of a clear judicial duty appertaining to their office and consonant to right and justice, and as such it may be enforced by mandate.

Exparte Crane, 5 Peters, 190.
" *Russell*, 13 Wall, 664.
" *U. S.*, 16 Wall, 699.
" *Robinson*, 19 Wall, 506.
R. R. v. *Wiswal*, 23 Wall, 507.

If the court be of opinion that the circuit court had no jurisdiction of the cause, its duty to dismiss is practically ministerial, and a *mandamus* ought to issue in the nature of a *procedendo* commanding the Circuit Judges to entertain the petition to dismiss and proceed to try and adjudge therein according to the right of the matter.

Livingston v. *Dorgenois*, 7 Cranch, 589.
Exparte Bradstreet, 7 Peters, 647.
" *Bradley*, 7 Wall., 364.

Otherwise we ask that the mandate go, directing the allowance of proper appeals, as of the date when application was made at the circuit.

HENRY CRAWFORD,
Solicitor.